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No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ELPIS SAKARIA *and* JACK AND LILLIAN HILLMAN
Petitioners,

v.

DARE COUNTY BOARD OF EDUCATION
Respondent.

On Petition For Writ of Certiorari To The North Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

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10 pp

QUESTION PRESENTED

Whether, consistent with the division of powers established by Article I and the Tenth Amendment to the United States Constitution, a state court may rely on a federal statute to expand state regulatory authority without express statutory authorization.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 8

BASIC PRINCIPLES OF FEDERALISM DEMAND REVIEW OF NORTH CAROLINA'S UNCRITICAL RELIANCE ON FEDERAL LAW TO EXPAND STATE REGULATORY AUTHORITY 8

I. The North Carolina Courts Erroneously Assumed That Federal Policy Enlarged The Board's Regulatory Power 10

II. *The Lower Courts' Conclusion That Federal Policy* Ipso Facto *Expands State Power Undermines The Basic Structure Of Our Federal System* 13

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Dare County Bd. of Educ. v. Sakaria, 456 S.E.2d 842 (N.C. Ct. App. 1995). 1

Dare County Bd. of Educ. v. Sakaria, 466 S.E.2d 717 (N.C. 1996). 1

Gregory v. Ashcroft, 501 U.S. 452 (1991). 2, 13, 19

Highway Comm'n v. Matthis, 163 S.E.2d 35 (1968). 6

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). 2, 7, 13, 18

Michigan v. Long, 463 U.S. 1032 (1983). . . . 2, 13, 15, 16

New York v. United States, 505 U.S. 144 (1992). 2, 7, 13-14, 18

Oregon v. Hass, 420 U.S. 714 (1975). 13, 16

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. X. 2, 8

U.S. CONST. art. II, § 1. 16

U.S. CONST. art. III, § 1. 16

STATUTES AND REGULATIONS

28 U.S.C. § 1257(a) (1995). 2

33 C.F.R. § 325.8(a) (1996). 11

33 U.S.C. § 1344 (1995). 2, 11

33 U.S.C. § 2317(a)(1) (1996). 11

N.C. GEN. STAT. § 115C-517 (1995). . . 2, 5-7, 10, 11, 14

Notice and Correction, 55 Fed. Reg. 9210 (1990) (Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army). 12, 14

OTHER MATERIALS

William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Question*, 78 CALIF. L. REV. 263 (1990). 16

Ginsburg, Book Review, 92 HARV. L. REV. 340 (1978) (reviewing LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (1st ed. 1978)). 16

Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484 (1987)(reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)). 13

SUP. CT. R. 10(c). 8

IN THE

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ELPIS SAKARIA *and* JACK AND LILLIAN HILLMAN
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v.

DARE COUNTY BOARD OF EDUCATION
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On Petition For Writ of Certiorari To
The North Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

Elpis Sakaria and Jack and Lillian Hillman respectfully petition for a writ of certiorari to the North Carolina Supreme Court.

OPINIONS BELOW

The judgment of the North Carolina Supreme Court is reported at 466 S.E.2d 717 (N.C. 1996). Pet. App. A. The opinion of the North Carolina Court of Appeals is reported at 456 S.E.2d 842 (N.C. Ct. App. 1995). Pet. App. B. The original opinion and corrected judgment (Pet. App. D) of the Dare County Superior Court are unreported.

JURISDICTION

The judgment of the North Carolina Supreme Court was entered on February 9, 1996. Pet. App. A. A petition for rehearing was denied on April 3, 1996. Pet. App. 2d. On July 2, 1996, the Chief Justice extended the time for filing this petition to and including August 1, 1996. This Court has jurisdiction under 28 U.S.C. § 1257(a) (1995).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, sections 8 (granting Congress powers of taxation, borrowing, defense, the regulation of interstate commerce, and the general welfare), and 10 (forbidding states to enter foreign treaties; coin money; or enact bills of attainder, ex post facto laws, or laws "impairing the Obligation of Contracts"); and the Tenth Amendment (reserving to the states all power not delegated to the Federal Government) to the United States Constitution are set out at Pet. App. E.

Section 404 of the Clean Water Act, 33 U.S.C. §§ 1344(a), (d) and N.C. GEN. STAT. § 115C-517 (1995) are reprinted at Pet. App. F.

STATEMENT

The United States Constitution expressly divides sovereign authority between national and state governments. *E.g.*, U.S. CONST. ART. I, §§ 8, 10; *id.* amend. X; *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). By ensuring that neither sovereign power fundamentally encroaches upon the other, that division promotes vitally important interests, including political

accountability and the uniformity and integrity of federal and state law. *See New York v. United States*, 505 U.S. 144, 169 (1992); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). The North Carolina courts—by decreeing that a school board may rely on federal regulations to condemn private property even though federal law does not expressly confer this authority—have blurred the division between federal and state power in an elemental way that only this Court can correct.

Respondent Dare County Board of Education (school board), is the local school board for Dare County, North Carolina. Pet. App. 3c. It operates the Cape Hatteras School (the school), a public school in Buxton, Dare County, North Carolina, that serves children from kindergarten through 12th grade. *Id.* The school sits on 18 acres, 17 acres less than the site standards set by the State of North Carolina (the state) and the Southern Association of Secondary Schools and Colleges (the association). Pet. App. 3c-4c. Despite the size of its campus, the school obtained accreditation from the state. The school, however, could not get accreditation from the association without enlarging its campus. *Id.*

In 1985 the school board investigated whether it could expand the school's site by constructing an athletic field on a 12.5 acre lot (owned by the board) just west of the academic campus. Pet. App. 2b-3b. Because 3.1 acres of the lot comprised wetlands, it fell within the jurisdiction of the United States Army Corps of Engineers and the North Carolina Department of Environment, Health and Natural Resources, Division of Coastal Management (Coastal Management). Pet. App. 3b. Construction of the athletic field, therefore, could

not begin until the board received permits from these state and federal agencies.

The school board's first permit application was denied in June 1988. Pet. App. 3b. Coastal Management rejected the application "because [the board's] proposal would result in an unacceptable loss of wetlands." *Id.* The board's second application was denied in 1992. *Id.*

In 1988, soon after Coastal Management rejected the board's first application, the school board formed an ad hoc committee to find land for the proposed athletic field. Pet. App. 4b. Throughout the site-selection process, the board was driven not only by state regulatory demands but by the ultimate need for federal approval. George Wood, an environmental consultant on the ad hoc committee, testified that "*the primary permit we had to achieve at that time was the Corps' approval under section 404 of the Clean Water Act.*" R.224 (emphasis added). To obtain that permit, the board (among other things) had to offer wetlands mitigation to offset any wetlands destroyed by the construction of the athletic field. Pet. App. 4b.

To satisfy the wetlands mitigation and other permit conditions, the board included property it did not then own in the third permit application. Pet. App. 3b. The application named six lots, surrounded by the Hatteras School property, owned by Petitioners Elpis Sakaria, a widowed American citizen born in Greece, and Jack and Lillian Hillman (Sakaria and the Hillmans). *Id.* The committee determined that their property not only met all educational criteria for construction of the athletic field but, in addition, included land suitable for fill and wetlands mitigation. Pet. App. 7c. After halfhearted

attempts to negotiate a purchase price—the school board offered $40,000 for six lots whose value had been placed at over $139,000 each (Pet. App. 11c)—the board adopted a resolution approving the condemnation of Sakaria's and the Hillmans' property on February 9, 1993. Pet. App. 3b.

On February 15, 1993, the board submitted its third permit application to the United States Army Corps of Engineers (Corps). Pet. App. 3b. The application proposed onsite, in-kind wetlands mitigation that would create 1.84 acres of wetlands for one acre of wetland filled by construction of the athletic field. Pet. App. 6c. Importantly, a significant portion of the property to be used for wetlands mitigation was owned by Sakaria and the Hillmans. Pet. App. 4b. This time the permit received conditional approval from the Corps. Pet. App. 3b.

On February 19, 1993 the board filed four actions in Dare County Superior Court to condemn the six lots. Pet. App. 3b. The court consolidated the actions and conducted a bench trial on the scope of the school board's condemnation authority. Pet. App. 3b-4b. The court concluded that N.C. Gen. Stat. § 115-517 (1995), which authorizes local school boards in North Carolina to condemn private property "for . . . school facilities," conferred on the board the implied power to condemn property to satisfy the wetlands mitigation requirements imposed by the federal Clean Water Act. Pet. App. 13c-14c.

Sakaria and the Hillmans appealed, arguing that "N.C. Gen. Stat. § 115C-517 [does not] permit[] a local board of education to condemn land solely used as wetlands mitigation and a source of fill." Pet. App. 7b. Sakaria and the Hillmans

argued that North Carolina law authorized the school board to condemn property to build school facilities, but not to obtain property for wetlands mitigation conditions imposed by federal law. *Id.* The court of appeals rejected this argument. *Id.*

The court acknowledged that there were, indeed, important restrictions on the state's eminent domain power. "[T]he manner in which eminent domain may be exercised is prescribed by our General Assembly." Pet. App. 8b. The court likewise acknowledged that, under North Carolina law, it had a special responsibility to construe strictly the eminent domain powers granted by the General Assembly:

> Because the exercise of the power of eminent domain is in derogation of property rights . . . statutory grants of the power of eminent domain are "limited to the express terms or clear implication of the act or acts in which the grant of the power of eminent domain is contained."

Id. (quoting *Highway Comm'n v. Matthis*, 163 S.E.2d 35, 38 (1968)).

Nevertheless, the court of appeals read N.C. Gen. Stat. § 115C-517 as granting the board "broad discretion to condemn . . . whenever the board is unable to acquire or enlarge the suitable site or right-of-way by gift or purchase." Pet. App. 8b. Once the school board has determined what land is necessary for the purposes described in the statute, the statute makes that determination "conclusive." *Id.* Under this analysis, the court concluded that the school board not only had the power to condemn property for actual school construction, but also possessed the implied authority to

condemn Sakaria's and the Hillmans' property for any wetlands mitigation requirements imposed by federal law. *Id.*

Sakaria and the Hillmans filed a notice of appeal and a petition for discretionary review with the North Carolina Supreme Court. The court retained the notice of appeal but denied the petition for discretionary review. Pet. App. 2g. The school board filed a motion to dismiss the appeal for lack of a substantial constitutional question, which the court denied. Pet. App. 1h. On February 9, 1996 the supreme court, acting per curiam, affirmed the court of appeals without opinion. Pet. App. 1a.

The constitutional question presented here—whether a state court may rely on the assumed dictates of federal law to expand state regulatory authority without violating the constitutional division of powers principles—was properly raised below. Both the superior court and court of appeals addressed whether N.C. Gen. Stat. § 115C-517 (1995) authorizes the school board to condemn the landowners' property for wetlands mitigation. Pet. App. 13c-14c; Pet. App. 7b. Because it is undisputed that federal law, through the Clean Water Act, is the source of any wetlands mitigation requirement, the condemnation question "fairly appears . . . to be interwoven with the federal law." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). Moreover, where (as here) state courts address a mixed question of federal and state law and fail to clearly state on the face of their opinions an adequate and independent ground of decision, this Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1041.

REASONS FOR GRANTING THE PETITION

BASIC PRINCIPLES OF FEDERALISM DEMAND REVIEW OF NORTH CAROLINA'S UNCRITICAL RELIANCE ON FEDERAL LAW TO EXPAND STATE REGULATORY AUTHORITY

Since the early days of the Republic, the dividing line between federal and state authority has mattered deeply. The reasons are clear. Among other things, this division of authority promotes political accountability and undergirds the integrity and uniformity of federal (and state) law. *New York v. United States*, 504 U.S. (1992); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Not surprisingly, the Court previously has demonstrated its willingness to review cases implicating these principles even where no circuit conflict is in play. *See, e.g., New York v. United States*, *supra*. The North Carolina courts' disregard of these principles in the proceedings below thus raises an important federal question warranting this Court's review. SUP. CT. R. 10(c).

Section 404 of the Clean Water Act authorizes the United States Army Corps of Engineers to require wetlands mitigation as a condition of receiving a permit to build on wetlands. The statute is silent, however, about a state's authority to condemn private property for wetlands mitigation. Similarly, the North Carolina statute authorizing local school boards to condemn private property for school facilities says nothing about wetlands mitigation. Accordingly, neither federal nor state law expressly authorizes the school board to condemn private property to satisfy the mitigation conditions of a Section 404 permit.

Despite the absence of express statutory authority, the North Carolina courts have held that the school board may condemn private property to satisfy the mitigation conditions of a Section 404 Clean Water Act permit. By stepping into the breach created by the silence of Congress and the North Carolina General Assembly, the courts below have violated fundamental protections accorded by the constitutional division of federal and state authority. *See, e.g.*, U.S. Const. Art. I, §§ 8, 10; *id.* amend. X. Indeed, the decision below violates at least three of the basic principles served by the Constitution's allocation of powers within our federal system.

First, it allows both federal and state officials to avoid political accountability. In the circumstances of this case, federal officials can escape political responsibility for the condemnation decision by asserting that "they" didn't condemn the land, while state officials can similarly avoid public outcry by asserting that "they" didn't require the wetlands mitigation. Neither government, in short, is ultimately accountable to the people for any repercussions of the political decision made below.

Second, by carelessly blending ingredients of federal and state law, the lower courts have undermined the integrity of that law. Congress, executive agencies, and federal courts will ultimately lose control of the content and scope of federal law if state courts are permitted to blend federal and state laws in a manner that ignores federal case law and congressional intent. Such a course could frustrate as well the efforts of state lawmakers when state court judgments appear to carry either the imprimatur or mandate of federal law.

Finally, the decision below promotes disunity in federal law. If left uncorrected, state courts will reach inconsistent interpretations of Section 404 of the Clean Water Act. Some will use a combination of Section 404 and state law to authorize condemnations for wetlands mitigation; others will not. The resulting inconsistencies could frustrate the federal government's attempts to enforce a consistent nationwide wetlands policy.

The North Carolina Court of Appeals held, and the North Carolina Supreme Court affirmed, that the Dare County school board had the authority to condemn Sakaria's and the Hillmans' property to satisfy the wetlands mitigation condition of a federal permit. Pet. App. 2a; Pet. App. 8b. Neither federal nor state law, however, expressly authorizes condemnation for wetlands mitigation. By concluding that federal wetlands policy implicitly expanded the board's eminent domain power, the lower courts carelessly coalesced federal and state law without regard for the constitutional limits on each sovereign's legitimate role in our federal system.

I. The North Carolina Courts Erroneously Assumed That Federal Policy Enlarged The Board's Regulatory Power

The North Carolina courts addressed "whether N.C. Gen. Stat. § 115C-517 permits a local board of education to condemn land solely used as wetlands mitigation and a source of fill." Pet. App. 7b. This question initially appears to rest solely on state law. The lower courts' resolution of the question, however, ultimately *did not* turn upon state law because, on its face, § 115C-517 does not authorize

condemnation of property for wetlands mitigation, but rather merely authorizes condemnation:

> . . . to acquire or enlarge a suitable site or right-of-way for a school, school building, school bus garage or for a parking area or access road suitable for school buses or for other school facilities . . . .

N.C. GEN. STAT. § 115C-517 (1995). Therefore, if the statute (as the lower courts held) includes the authority to condemn private property for wetlands mitigation, the source of *that* power lies in federal law.

The property on which the board proposed to build its athletic field fell within the jurisdiction of the Corps of Engineers. Pet. App. 3b. Indeed, as the board's own expert testified, compliance with federal wetlands policy was the ultimate goal of the board's third permit application. "[T]he primary permit we had to achieve at that time was the Corps' approval under section 404 of the Clean Water Act." R.224. Given the importance of federal approval, therefore, the natural question for the courts below was whether the Clean Water Act authorized the board to condemn property for wetlands mitigation. *That* question, however, went unasked—presumably because the Clean Water Act does not even address, much less grant, a state's authority to condemn property.

Section 404 of the Clean Water Act, 33 U.S.C. § 1344 (1996), authorizes the Secretary of the United States Army, "acting through the Chief of Engineers," to issue "permits ... for the discharge of dredged or fill materials in the navigable waters [of the United States]." *Id.* at §§ 1344(d), (a). Such

permits are issued "subject to such conditions as [the Secretary] or his authorized representative may from time to time impose." 33 C.F.R. § 325.8(a) (1996). The Corps of Engineers, furthermore, has the statutory goal of ensuring "no overall net loss of the Nation's remaining wetlands base." 33 U.S.C. § 2317(a)(1) (1996). To achieve this goal, "[m]itigation requirements shall be conditions of standard Section 404 permits." Notice and Correction, 55 Fed. Reg. 9210, 9213 (1990) (Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army). Mitigation, in turn, takes three forms: "avoidance, minimization and compensatory mitigation." *Id.* at 9211. But, despite the foregoing details, neither the statute, its legislative history, its implementing regulations, nor the Memorandum of Agreement authorizes a state to condemn private property for compensatory wetlands mitigation. On this point federal law is simply silent.

The lower courts, in a series of unjustified leaps of logic, construed this silence as a federal expansion of state regulatory power. From state law, North Carolina courts derived the school board's authority to condemn *in general*. From federal law, the lower courts marked the *specific contours* of the *general* power: the board could use its general condemnation power to achieve the specific wetlands mitigation goals of federal policy. The lower courts, in short, declared that the Clean Water Act—even without expressly so providing—expanded the regulatory authority of the state.

This result, at first blush, hardly seems remarkable. After all, modern federal law often requires the joint action and cooperation of state and federal governments. But in such cases, the contours (and demands) of joint federal/state action

are specifically and expressly established; the dividing line between state and federal authority, however intertwined, is nevertheless spelled out. *See, e.g.*, 16 U.S.C. §§ 1451-65 (Coastal Zone Management Act of 1972); 16 U.S.C. §§ 461-69j (establishing National Trust For Historic Preservation). As a result, citizens affected by joint federal/state action know where to go to obtain political relief, the respective sovereigns are apprised of the limits of their regulatory competencies, and the express boundaries between the sovereigns aid the federal courts in maintaining the uniformity of federal law. The regime established below is devoid of any of these virtues.

II. The Lower Courts' Conclusion That Federal Policy *Ipso Facto* Expands State Power Undermines The Basic Structure Of Our Federal System

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Among other things, "a healthy balance of power between the States and the Federal Government" *(id.* at 458) promotes political accountability, *e.g., New York v. United States*, 505 U.S. 144, 168-69 (1992), the integrity of federal and state law, *e.g., Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *Oregon v. Hass*, 420 U.S. 714, 719 (1975), and the uniformity of federal law, *e.g., Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816). *See generally* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1481-1511 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)). The decision below undermines each of these principles.

1. This Court recognized in *New York v. United States*, 505 U.S. 144 (1992), that the clear division of authority between state and federal governments promotes an exceptionally significant value in our democratic society: political accountability. In that case, the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 was held unconstitutional under the Tenth Amendment because it "compel[led] the States to enact or administer a federal regulatory program." *Id.* at 188. The Court viewed such compulsion as diminishing "the accountability of both state and federal officials." *Id.* at 168. Federal officials can shift "the brunt of public disapproval" to state officials, while state officials, in turn, can blame the federal government for compelling the state to administer an unpopular program. *Id.* at 169. The decision below similarly diminishes political accountability.

Federal law allows the Army Corps of Engineers to require wetlands mitigation as a condition of receiving a permit to build on wetland (*e.g.*, Notice and Correction, 55 Fed. Reg. 9210, 9213 (1990)), but says nothing about how such compensatory property will be obtained. Conversely, North Carolina law authorizes local school boards to condemn property (N.C. GEN. STAT. § 115C-517 (1995)), but says nothing about condemning property for wetlands mitigation. As a result, federal officials can argue that the board of education condemned the property, and the board (in turn) can argue that the federal government required the condemnation for wetlands mitigation. Thus, all of the governmental decisionmakers in this case can plausibly (and effectively) escape any adverse political consequences of the decision to condemn Sakaria's and the Hillman's property. And, with that escape, one of the most important principles guarded by our

system of federalism—public accountability for official actions—is undermined.

2. A healthy division of federal and state authority not only promotes political accountability, it also guarantees the integrity of federal and state law. Integrity, in this sense, ensures that each sovereign in the federal system determines the content of its own law.

Michigan v. Long, 463 U.S. 1032 (1983), underscores the importance of maintaining a clear separation between federal and state authority to protect the integrity of the nation's coordinate legal systems. There, the Court held that it had jurisdiction to review a state court decision if the judgment under review lacked "a plain statement that [it] rested on an adequate and independent state ground" because "such an approach will . . . preserve the integrity of federal law." *Id.* at 1044, 1041; *cf. Oregon v. Hass*, 420 U.S. 714, 719 (1975) (holding that state courts may not impose such greater restrictions as a matter of federal constitutional law "when this Court specifically refrains from imposing them"). The decision below directly implicates the concerns about the integrity of federal and state law that inform *Long* and *Hass*.

The Constitution places Congress, the president, and federal courts in control of federal law. U.S. CONST. art. I, § 1; art. II, § 1; art. III, § 1. Correlatively, state courts have a duty to interpret federal law according to congressional intent, the guidance of executive agencies, and federal court decisions. If state courts were free to fuse state and federal law without regard for congressional intent, administrative guidance, or federal case law, federal officials would effectively lose control over the content and scope of federal law. This prospect,

moreover, is not merely of hypothetical concern. Since none of the above-mentioned sources of federal interpretation offers any support for what the lower courts in this case simply assumed—that the Clean Water Act establishes purposes for which states may condemn private property—the decision below effectively undermines the integrity of federal law.

The decision below likewise affects the integrity of state law. After *Hass* and *Long*, "[i]f [state courts] wish to reach a result not compelled by federal law, they must make clear that state law provides the basis for their decision." William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 290 (1990). Otherwise, a state court could "immunize its decision against overruling through state political processes." Ginsburg, Book Review, 92 HARV. L. REV. 340, 343 (1978) (reviewing LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (1st ed. 1978)). By relying on federal law to expand state regulatory authority, however, the courts below have created an ambiguous ground of decision that may frustrate correction by state lawmaking processes. Faced with the decision below, which is apparently grounded on federal law, the North Carolina General Assembly could reasonably conclude—even if it desired otherwise—that it could not withhold the authority to condemn property for wetlands mitigation from school boards.

3. The proper division of authority between federal and state governments also promotes the uniformity of federal law. This Court's jurisdiction over state court decisions exists, in important part, to further this end. As Justice Story pointed out long ago:

> Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution.

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 348 (1816) (Story, J.).

The courts below held that North Carolina law authorizes a local school board to condemn property to satisfy the mitigation requirements of a federal Clean Water Act permit. Pet. App. 8b. This holding undermines the uniformity of federal law by opening up the possibility of inconsistent decisions from state to state on the same point of law. This is the possibility that Justice Story identified as a principal *raison d'être* for this Court's appellate jurisdiction over state court decisions involving federal law. The salient consequence of failing to review this decision is plain: forming a consistent nationwide wetlands policy could well be frustrated by a diversity of state court decisions regarding the ability of state agencies to invoke the Clean Water Act as grounds for a condemnation action.

* * *

The division of authority between state and federal governments involves far more than fussy formalism. *New York v. United States*, 505 U.S. 144, 187-88 (1992). On the contrary, that division goes to the essence of our constitutional structure, which divides power to preserve freedom.

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty.

Gregory v. Ashcroft, 501 U.S. 452, 458, 459 (1991).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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August 1, 1996

APPENDIX A

IN THE SUPREME COURT OF NORTH CAROLINA

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate,
Plaintiff,
v.
ELPIS SAKARIA
Defendant.

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate,
Plaintiff,
v.
RAJ ALEXANDER TRUST, Elpis J.G.B.
Sakaria, Trustee,
Defendant.

DARE COUNTY BOARD OF EDUCATION
a body politic an corporate,
Plaintiff,
v.
JERA ASSOCIATES, a Maryland
Partnership,
Defendant.

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate,
Plaintiff,
v.
JACK HILLMAN and wife, LILLIAN HILLMAN,
Defendants.

Appeal by defendants as of right pursuant to N.C.G.S 7A-30(1) of a decision by the Court of Appeals which affirmed judgments for the plaintiff by the Superior Court, Dare County, 118 N.C. App. 609, 456 S.E. 2d 842 (1995), and which involves substantial questions arising under the Constitution of the United States and the Constitution of this State. Heard in the Supreme Court 12 December 1995.

W. Brian Howell and Deveau & Norcross, P.A., by Ronald E. DeVeau, for plaintiff-appellee.

Vandeventer, Black, Meredith & Martin, by Robert L O'Donnell, for defendants-appellants.

PER CURIAM.

AFFIRMED.

APPENDIX B

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate, Plaintiff,
v.
Elpis SAKARIA, Defendant.

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate, Plaintiff,
v.
RAJ ALEXANDER TRUST, Elpis J.G.B.
Sakaria, Trustee, Defendant.

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate, Plaintiff,
v.
JERA ASSOCIATES, a Maryland Partnership,
Defendant.

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate, Plaintiff,
v.
Jack HILLMAN and wife, Lillian Hillman.
No. COA94-739.

Court of Appeals of North Carolina.
May 2, 1995.

Appeal by defendants from judgment entered 27 April 1994 and corrected judgment entered 25 May 1994 in Dare County Superior Court by Judge Jerry R. Tillett. Heard in the Court of Appeals 23 March 1995.

Kellogg, White, Evans and Gray by Ronald E. DeVeau, Manteo, for plaintiff-appellee.

Vandeventer, Black, Meredith & Martin by Norman W. Shearin, Jr., Robert L. O'Donnell, and R. Gregory McNeer, Jr., Kitty Hawk, for defendant-appellants.

GREENE, Judge.

Elpis Sakaria, Raj Alexander Trust, Elpis J.G.B. Sakaria, Trustee, Jera Associates, and Jack and Lillian Hillman appeal from a 27 April 1994 final judgment and 25 May 1994 corrected judgment entered in Dare County Superior Court, decreeing that the Dare County Board of Education (plaintiff) has the authority to condemn lands for construction and use of proposed school facilities. All the defendants gave notice of appeal; however, because the assignments of error and arguments in defendants' brief only relate to property belonging to defendants Sakaria and the Hillmans, we need only address those arguments. N.C.R.App.P. 10(c)(1); N.C.R.App.P 28(b).

Plaintiff is responsible for the operation of the Cape Hatteras School (the School) in Buxton, North Carolina, which is located on the Pamlico Sound side of Hatteras Island, part of the Outer Banks. Beginning in 1985 and again in 1988, plaintiff recognized that the School needed additional athletic facilities in order to meet state and southern accreditation requirements and began efforts to expand the School's athletic facilities in 1985. Plaintiff owns a 12.5 acre tract of land which is located west of the School's campus, which includes all land from the highway to the Pamlico

Sound east of defendants' lots. Therefore, defendants' lots are surrounded by plaintiff's property on three sides, and the Pamlico Sound on the fourth side. Because portions of plaintiff's land and defendant's lands are wetlands, they are within the jurisdictional bounds of the United States Army Corps of Engineers (the Corps) under Section 404 of the Clean Water Act, 33 U.S.C. Section 1344 and Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. Section 403 and of the North Carolina Department of Environment, Health and Natural Resources, Division of Coastal Management (Coastal Management) and subject to numerous state and federal regulations.

Plaintiff planned to use its 12.5 acre lot, which contains 3.1 acres of wetlands, to expand the School's athletic facilities. In June 1988, Coastal Management denied plaintiff's requests for a dredge and fill permit and water quality certification to make the 12.5 acre tract suitable for building athletic fields because plaintiff's proposal would result in an unacceptable loss of wetlands. A second permit application by plaintiff in 1992 was denied by both Coastal Management and the Division of Environmental Management after the coastal wetlands were realigned. On 9 February 1993, plaintiff adopted a resolution approving condemnation of defendant's six lots, lot 5 belonging to the Hillmans and lot 6 belonging to Sakaria, and submitted a proposal involving defendants' lots to the Corps on 15 February 1993. Under this proposal, defendants' lots 5 and 6 would be used only as a source of fill and for wetlands mitigation. This proposal received a conditional permit from the Corps. On 19 February 1993, plaintiff filed four separate actions in Dare County Superior Court to condemn the six lots. The four actions were consolidated, and the court conducted a bench trial on

the issue of plaintiff's authority to condemn defendants' property.

At trial, Allen Burrus (Mr. Burrus), a member of plaintiff, testified that after Coastal Management denied a permit to use plaintiff's 12.5 acres for additional facilities, plaintiff "formed an ad hoc committee" which looked for available and suitable properties that were within "five miles of the facility," consisted of "eight or ten acres" and "had to be accessible by road, hard road." Mr. Burrus testified that the properties considered by the ad hoc committee were unavailable because they either did not meet the criteria necessary for school facilities, were deemed an Area of Environmental Concern, consisted of federal property belonging to the National Park Service, or were rejected by the various federal and state agencies having jurisdiction over the wetlands.

Mr. Burrus testified that in order to get a permit from the Corps, plaintiff had to mitigate damages to wetlands, and defendants' property was being offered to satisfy that mitigation "(n)ot completely but at least partly." Plaintiff's proposal, which included using defendants' lots, received a conditional permit from the Corps. Under plaintiff's proposal, of the 1.8 acres necessary to satisfy the requirement of wetlands mitigation, "approximately a half an acre" of lots 5 and 6 would be used, with property owned by plaintiff supplying the remaining 1.3 acres necessary for mitigation. Mr. Burrus stated that plaintiff's ad hoc committee had "looked for complete sites" and, therefore, had not searched "for alternatives to find a half acre that can be offered for mitigation." Mr. Burrus agreed that there are numerous parcels within Dare County that would contain a half acre of

property that could be used to satisfy the mitigation requirement, but because the agencies presented to plaintiff "in verbal exchanges more than once" that on-site mitigation would increase its chances of obtaining a permit, plaintiff looked for "on-site, on-kind mitigation." Mr. Burrus agreed, however, that the Corps permitted off-site mitigation. When asked whether plaintiff considered establishing the half acre of wetlands on property plaintiff already owned, Mr. Burrus replied, "Yes, sir, there was... They just-they never gave us a yes on that. They gave us a yes on this particular scenario (involving defendants' properties) and that's it. And we offered them quite a few scenarios."

George Wood (Mr. Wood), an environmental consultant, testified that he was on the ad hoc committee that looked at forty-one possible sites for the proposed athletic fields. In the second application, plaintiff requested authorization to use a site south of Canadian Hole for off-site mitigation, but the request was denied by Coastal Management. Mr. Wood stated he did not know all the reasons for the denial, "but one of the considerations was that there was concern about off-site mitigation, that the preference of the state agencies was for mitigation which was closer to the development site." On-site means "near the site" where the impacts are. He explained that although off-site mitigation is permitted under the federal regulations, "it is not the highest preference" because the Corps prefers "to have at least the mitigation done in the same system as the unavoidable impacts are done... (I)f there is the opportunity for a higher level of practicable mitigation, higher level in their priority of consideration, that you should use the highest level of mitigation practicable." Mr. Wood testified that the forty-one sites considered by the ad hoc committee were first

viewed for use as the facilities, and "they were subsequently reviewed again for sites for mitigation, so we visited each site twice." None of the sites, however, were appropriate for various reasons, including distance, expense, unsuitability, or unavailability. Mr. Wood also stated that in considering defendants' lots:

> We were trying to meet all the regulatory requirements, site-development requirements and we were trying as best we could to duplicate uses for as much of the property as possible so we could meet the minimization, so that we could meet the requirements of the mitigation not only by the Corps of Engineers but by the state agencies and so that we could meet the requirements of environmental management and other regulatory agencies that were all tugging on this application in different ways. So we felt that the proposed plan-in fact, we were encouraged by the agencies that the proposed plan had merit and that we should advance it and we did and we received approval... (T)he school board advanced the application, but it was advanced at the advice and the consultation with the state and federal agencies, so it was-it was a negotiated application certainly.

He testified that plaintiff advanced its proposal involving defendants' lots to meed the Corps' requirements "to minimize wetland impacts and then to adequately mitigate under their sequence of preference" and to comply with applicable regulations. Mr. Wood also testified that he did not think Coastal Management "rejected the consideration of off-site mitigation. We certainly pursued it, continued to pursue it."

After making findings of fact, the trial court, in its order filed 27 April 1994, concluded plaintiff "has the authority to take the lands of" defendants by condemnation. The court also concluded the lands described in the complaints are necessary for the construction of the school facilities proposed by plaintiff and the uses of portions of the property for wetlands mitigation and a source of fill are necessary for

the construction of the school facilities proposed and clearly implied in the condemnation authority of plaintiff. The trial court therefore ordered that plaintiff has the authority to condemn defendants' lots, vested title to defendants' properties in plaintiff, and ordered the Dare County Clerk of Superior Court to disperse the deposits made by plaintiff pursuant to N.C.Gen.Stat. Section 40A-41 to each of the defendants "as a credit upon the amount of compensation to be determined and provided by law." The court then entered a corrected judgment "to include the specific descriptions of the lands affected and of the property acquired by" plaintiff.

The issues presented are (I) whether N.C.Gen.Stat. Section 115C-517 permits a local board of education to condemn land solely used as wetlands mitigation and a source of fill; and (II) if so, whether plaintiff's action of condemning lots 5 and 6 as necessary to build athletic facilities was an arbitrary abuse of discretion.

I.

Defendants first argue that taking lots 5 and 6 only "for mitigation and as a source of fill is neither authorized by the limited grant of authority contained in N.C.G.S. Section 115C-517 nor clearly implied by the grant" because such uses are not "to construct any 'school facility.'" We reject this argument.

Eminent domain is the "power of the State or some agency authorized by it to take or damage private property for a public purpose upon payment of just compensation," and the manner in which eminent domain may be exercised is prescribed by our General Assembly. *Highway Comm'n v.*

Matthis, 2 N.C.App.233, 238, 163 S.E.2d 35, 38 (1968). Because the exercise of the power of eminent domain is in derogation of property rights, all laws conferring this power must be strictly construed; therefore, statutory grants of the power of eminent domain are "limited to the express terms or clear implication of the act or acts in which the grant of the power of eminent domain is contained." *Id.*

Local boards of education possess the power of eminent domain and have broad discretion to condemn under Chapter 40A of the General Statutes a "suitable site or right-of-way" for "a school, school building, school bus garage or for a parking area or access road suitable for school buses or for other school facilities" whenever the board is unable to acquire or enlarge the suitable site or right-of-way by gift or purchase. N.C.G.S. Section 115C-517 (1994). "(T)he determination of the local board of education of the land necessary for such purposes shall be conclusive" provided that no more than a total of fifty acres for one site is condemned. *Id.* Plaintiff, therefore, has the discretion under Section 115C-517 to determine what land constitutes a "suitable site" to construct its athletic facilities and what land is "necessary" to construct its athletic facilities, which may, depending on the circumstances of a particular case, encompass more than the actual land on which the athletic facility sits. Plaintiff, therefore, had the discretion under Section 115C-517 to determine that lots 5 and 6 are "necessary" to construct its proposed athletic facilities.

II.

Under Section 115C-517, the courts are bound by the discretionary decision of a local board of education in

selecting and determining the land necessary to construct a school, school building, school bus garage, a parking area, an access road suitable for school buses or "other school facilities" unless that decision is an "arbitrary abuse of discretion or disregard of law." *Board of Educ. v. Allen*, 243 N.C. 520, 523, 91 S.E.2d 180, 183 (1956) (discussing predecessor to 115-517); *see also Department of Transp. v. Overton*, 111 N.C.App. 857, 859, 433 S.E.2d 471, 473 (1993); *Guyton v. Board of Transp.*, 30 N.C.App. 87, 90, 226 S.E.2d 175, 177 (1976). A discretionary act is an arbitrary abuse of discretion when it is "not done according to reason or judgment, but depending upon the will alone" and "done without reason." *In re Housing Auth.*, 235 N.C 463, 468, 70 S.E.2d 500, 503 (1952); *Wyatt v. Hollifield*, 114 N.C.App. 352, 358, 442 S.E.2d 149, 153 (1994) (abuse of discretion means action so arbitrary it could not have been result of a reasoned decision).

Defendant argues that plaintiff's decision to use lots 5 and 6 only for wetlands mitigation and as a source of fill is arbitrary and capricious because "there were alternate sources available to meet (plaintiff)'s mitigation needs," and plaintiff did not explore available off-site mitigation alternatives. We disagree.

The evidence in this record shows that because the area on Hatteras Island on which plaintiff is proposing to build an athletic facility is an ecologically sensitive area containing a significant portion of wetlands which are under the jurisdiction of the Corps and Coastal Management and subject to other federal and state agencies, plaintiff cannot construct its proposed athletic facility without having additional land for wetlands mitigation and as a source for fill. For mitigation

purposes, plaintiff has to create wetlands to replace the acre of wetlands which was to be filled under its proposal. The evidence also shows that after plaintiff's proposal in its first permit application was rejected, plaintiff formed a committee and considered forty-one sites as "complete sites" and for mitigation purposes, all of which were rejected because of cost, distance, or other reasons. In its second permit application, which was denied, plaintiff proposed areas of off-site mitigation which were also rejected by Coastal Management. Although plaintiff was aware that off-site mitigation was permitted and there were other sources of fill on Cape Hatteras, the Corps and Coastal Management gave off-site mitigation a lower preference than on-site mitigation, rejected all of the off-site mitigations proffered by plaintiff, and encouraged the proposal involving lots 5 and 6, which would provide on-site mitigation. Although there is evidence that alternate sites were available which plaintiff did not consider, we cannot say on this record that plaintiff's decision to condemn lots 5 and 6 was "not done according to reason or judgment, but depending upon the will alone" and "done without reason." Therefore, plaintiff's decision that lots 5 and 6 are necessary for construction of its athletic facilities was not an arbitrary abuse of discretion.

Defendants also argue in their brief that the trial court "clearly erred in finding that (plaintiff) made a good faith effort to acquire all six lots by purchase as required by N.C.G.S. Section 115C-517." Because, however, defendants did not assign this finding as error, we need not address this

argument. N.C.R.App.P. 10(c)(1). For these reasons, the decision of the trial court is

Affirmed.

LEWIS and MARK D. MARTIN, JJ.,
concur.

APPENDIX C

North Carolina — General Court of Justice
Dare County — Superior Court Division

DARE COUNTY BOARD OF EDUCATION,
a body of politic and corporate
Plaintiff — 93-CVS-127

v.

ELPIS SAKARIA
Defendant

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate
Plaintiff — 93-CVS-128

v.

RAJ ALEXANDER TRUST, Elpis J.G.B. Sakaria, Trustee
Defendant

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate
Plaintiff — 93-CVS-129

v.

JERA ASSOCIATES, a Maryland Partnership
Defendant

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate
Plaintiff 93-CVS-130

v.

JACK HILLMAN and wife, LILLIAN HILLMAN
Defendants

CORRECTED JUDGMENT

THIS CAUSE coming on to be heard and being heard before His Honor, Jerry R. Tillett, Judge Presiding, at the January 25, 1994 session of the Dare County Superior Court, upon the Complaint, Declaration of Taking and Notice of Deposit of the Plaintiff in each of the above captioned actions, and the Answers and Amended Answers of the Defendants, the cases being consolidated for hearing by Order of January 25, 1994, and it appearing to the Court that all parties have been duly served and are properly before the Court, and the Court finding that the Plaintiff in each of the above captioned actions is a local public condemnor, determines that all of the issues raised by the pleadings, other than the issue of compensation, may be heard and determined either in or out of session pursuant to G.S.40A-47; and upon hearing of the witnesses and evidence of the Defendants, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Plaintiff, the Dare County Board of Education, is a body corporate under G.S.115C-40 and is a local public condemnor pursuant to G.S.40A-3(b).

2. That the lands affected by the condemnation action and the lands subject to the taking, are described in attachments to the Complaints in each of the actions.

3. The Plaintiff is a local Board of Education authorized to acquire lands by eminent domain for school facilities.

4. That the purpose for which the lands of the Defendants are sought to be condemned is for the expansion of the Physical Education facilities, athletic facilities, school playground, educational uses and the expansion of the Cape Hatteras School campus.

5. The Cape Hatteras School is a K-12 school located in Buxton, Dare County, North Carolina, the site for which is only eighteen (18) acres. A survey by the North Carolina Department of Public Instruction in 1977 and 1985 stated that thirty-five (35) acres are needed for a K-12 school and athletic field, and that the site is only forty-eight percent adequate in size for a K-12 school.

6. The Cape Hatteras School is accredited by the State of North Carolina under a waiver but not accredited by the Southern Association of Secondary Schools and Colleges. A

significant reason for this is the fact that the area of the campus is only eighteen acres rather than thirty-five acres.

7. In 1985 and again in 1988, the Dare County Board of Education recognized that existing athletic facilities were inadequate in space, there not being enough fields nor enough property.

8. Without obtaining additional high ground, with approximately ninety percent of the present eighteen acre site being high land, there is not sufficient buildable high land owned by the Board of Education to build the athletic facilities to minimum standards.

9. In 1985, the Board of Education began an investigation of the feasibility of expanding recreational facilities at the school by focusing on a 12.5 acre tract located to the west of the existing campus which it had acquired in the late 1970s.

10. Approximately 3.1 to 3.2 acres of the 12.5 acre tract are high lands and the remainder are wetlands.

11. In June of 1988, the Division of Coastal Management denied the Board of Education's application for a permit to use the 12.5 acre tract for expansion of school recreational facilities based on the resulting loss of wetlands and coastal marsh.

12. After this denial, the Board of Education formed and ad hoc committee of eight local Hatteras Island residents to locate properties for the expansion.

13. The criteria for these properties specify an eight to ten acre minimum size, located within five miles of the present Cape Hatteras School, and accessible by road.

14. Forty-one properties were reviewed both for meeting the criteria established for the construction of the facilities and for wetlands mitigation. A few sites which met the criteria were located in an area of environmental concern and could not be developed. There were no other properties which met the criteria.

15. Between August 1988 and March 1992, the Board of Education reduced and reconfigured the plans for the project in order to minimize the impact to wetland areas. During the review process of this second permit application for a Water Quality Certification and a dredge and fill permit, the Division of Coastal Management determined that physical changes had occurred to require a new coastal wetlands alignment which resulted in the revised plans again impacting coastal wetlands.

16. The second permit application for the project was denied by the Division of Environmental Management (DEM) on July 14, 1992 and the Division of Coastal Management (DCM) on August 4, 1992.

17. The location of the proposed facilities described in the second application would not have impacted or involved any of the Defendants' properties, nor their access easement and would not have necessitated the acquisition of these properties by the Board of Education.

18. Off site mitigation of wetlands impact was also pursued at numerous locations which were found to not be suitable by reason of objections or refusals by various governmental agencies, shoreline erosion, distance, or cost.

19. The Dare County Board of Education sought for a third time, a permit to fill wetlands and reduced the proposed facilities to the bare minimum that would allow the school to meet the criteria of the Division of School Planning and North Carolina Athletic Association Rules and Regulations and for accreditation. These reduced facilities were proposed to be built on the existing school campus and on adjoining lands owned by the Defendants.

20. This third application proposed on site, in kind mitigation, to create 1.84 acres of wetlands to replace approximately 1 acre of wetlands to be filled in connection with the project.

21. The proposed athletic and playground facilities in this third application included a baseball field; a football/soccer/softball combination field; in addition to bleachers, storm water drainage and septic tank repair areas.

22. The baseball field an part of the bleachers, football field and vegetative filter for storm water drainage are proposed to be located on lands over which the Defendants now have their access easement and on four of the Defendants' six lots.

23. The proposed baseball field would be located over substantially all of that part of Defendants' access easement which runs northwardly from N.C. Highway 12.

24. The proposed vegetative filter required for storm water management would be located over another portion of the access easement and over parts of Lots 1 and 2 owned by the Defendants.

25. All six lots of the Defendants, including all of the east-west access easement, together with existing lands owned by the Dare County Board of Education on the same site, will be used to supply fill material to those areas of wetland being filled for which mitigation is required.

26. In order to meet the requirement of converting highlands into wetlands to mitigate for filling other wetlands, portions of all six lots and the access easement of the Defendants together with lands of the Dare County Board of Education located on the west and adjacent to N.C.Highway 12 are to be used for wetlands mitigation.

27. There is a required setback of fifty (50) feet from the septic tank repair area to the edge of any wetlands or wetlands created for mitigation purposes.

28. The U.S. Army Corps of Engineers "404" line of denoting Corps of Engineers jurisdiction and the North Carolina Coastal Area Management Act jurisdictional wetlands line, crosses the southern portion of all six of the Defendants' lots resulting in those lots being substantially within the jurisdictional boundaries of the U.S. Army Corps of Engineers and the North Carolina Coastal Area Management Act.

29. Non-water dependent uses cannot be constructed within

the CAMA (Coastal Area Management Act) jurisdictional wetlands. Water dependent uses would include linear structures such as piers for access to the sound waters. A residence or house could not be built in CAMA wetlands, even on pylons, in February of 1993 when these actions were filed.

30. The acquisition of the Defendants' lands will add additional contiguous acreage to the existing eighteen acre school campus toward the thirty-five acres which are needed for the K-12 school.

31. Portions of the proposed facilities would occupy parts of and directly impact and affect all of the lands, lots and easement of the Defendants.

32. Other educational uses planned by the Board of Education would involve the lands now owned by the Defendants to teach environmental sciences, research and study of wetlands, and educational programs regarding mitigation, preservation, enhancement and understanding of maritime forests and wetlands.

33. The proposed school athletic facilities are designed using approved standards and specifications of the North Carolina Recreational Standards for High School and Middle School Play and State Facilities Planning Standards.

34. Because portions of the existing lands of the Board of Education where the Cape Hatteras School is located, and the lands of the Defendants proposed for acquisition for the development of school facilities, are wetlands and lie within the

jurisdictional bounds of the North Carolina Department of Environment, Health and Natural Resources and the U.S. Army Corps of Engineers, some fifteen state and federal agencies had to be dealt with and reviewed the permit application for the facilities proposal.

35. Around 25,000 square feet of vegetative filter of at least 50 feet in width is required by the Division of Environmental Management for storm water management related to the Cape Hatteras School site, including the proposed new facilities.

36. The siting of the new proposed facilities was driven in part by the relocation of the CAMA jurisdictional wetlands, to meet regulatory requirements and to duplicate uses of the property in order to minimize wetlands impacts.

37. The present lands of the Dare County Board of Education, and in addition thereto, the lands of the Defendants which the Board of Education has determined are necessary for the proposed facilities, are permittable for the construction of the facilities proposed in the third permit application.

38. The third permit application for the Cape Hatteras School campus facilities was approved by the appropriate state and federal agencies pursuant to their jurisdictional authority.

39. In order to construct the Cape Hatteras School facilities, all of the conditions in the approved permits would have to be met. The Dare County Board of Education cannot construct its proposed facilities unless it meets all the conditions of the issued permits. With the issuance of the permits now held by the

Plaintiff, the lands of the Defendants sought to be condemned are suitable for the school facilities proposed by the Plaintiff.

40. These permit conditions include:

a. The prevention of increase in turbidity outside the construction area; and

b. The mitigation plan proposed is followed with certain modifications; and

c. Notification of DEM Wetlands Group in advance of site grading; and

d. An erosion and sedimentation plan being filed; and

e. Mitigation being coordinated with the Division of Coastal Management and the NC Wildlife Resources Commission; and

f. Inspections by state agencies and the Corps of Engineers; and

g. The mitigation area being monitored by qualified personnel; and

h. An archeological site survey and testing being conducted; and

i. Construction must be completed by December 31, 1996; and

j. Notification of the U.S. Army Corps of Engineers before commencement and completion of construction.

41. The property of the Defendants, being the subject of this action, is surrounded by existing properties of the Dare County Board of Education on three sides.

42. Negotiations by the Plaintiff with the Defendants to purchase their property began in 1988. Reports of the

negotiations with the Defendants were made to the Board of Education by its attorney on a regular basis.

43. After obtaining appraisals of the Defendants' properties, the attorney for the Board of Education was authorized to offer $44,000.00 for the Defendants' properties and to go up to $60,000.00 before getting further Board approval.

44. One of the Defendants, Mr. Hillman, negotiated for all of the Defendants and met with the Board of Education attorney asking $139,000.00 for each lot of the Defendants.

45. Between February 9, 1993 and February 19, 1993, before filing these condemnation actions, an offer to purchase all of the Defendants' lands for $44,400.00 was made to Mr. Hillman. This offer was not accepted. The Defendants last demand was for $139,000.00 for each of the six lots.

46. The Plaintiff has sought in good faith to purchase the lands of the Defendants and the lands sought to be condemned, but has been unable to acquire said lands by gift or purchase.

47. In a regular session of the Dare County Board of Education on Tuesday, February 9, 1993, the Board adopted a resolution finding that the Board of Education had been unable to acquire the needed property through negotiations for the purchase thereof during the preceding three years, and authorized the acquisition, by condemnation, of the Defendants' property.

48. On February 19, 1993, the Dare County Board of Education initiated these four actions pursuant to Chapters

115C and 40A of the North Carolina General Statutes to acquire by condemnation real property owned by the Defendants.

49. Each of the Defendants filed answer to the condemnation proceeding following an Order granting an Extension of Time, which answers challenged the authority of the Board of Education to condemn each of the Defendants' properties.

50. The Plaintiff deposited a total of $20,400.00 with the Clerk of Superior Court of Dare County estimating the sum of $3,400.00 to be just compensation for each parcel owned by the Defendants.

51. There has been no disbursement of the deposits by the Clerk of Superior Court to any of the Defendants and pursuant to G.S. 40A-42, the title to the Defendants' lots has not vested in the Dare County Board of Education.

Based upon the foregoing facts, the Court makes the following Conclusions of Law:

1. That the Plaintiff has the authority to take the lands of the Defendants, described in each of the Complaints, by Condemnation; and

2. That the lands described in the Complaints are necessary for the construction of the school facilities proposed by the Plaintiff and the uses of portions of the property for a vegetative buffer, wetlands mitigation, a source of fill, and for septic tank repair areas that are required and necessary for the construction of the

school facilities proposed, are clearly implied in the condemnation authority of the Dare County Board of Education; and

3. That title to the properties described in the Complaints should vest in the Dare County Board of Education, and the Board of Education should be entitled to possession and ownership thereof; and

4. That the Clerk of Superior Court of Dare County should disperse the deposit made in each of the actions by the Plaintiff pursuant to G.S. 40A-41 to each of the Defendants as a credit upon the amount of compensation to be determined as provided by law; and

5. That this matter should be retained on the docket for trial as to the issue of just compensation.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that:

1. The Plaintiff has the authority to take the lands of the Defendants, described in each of the Complaints, by condemnation; and

2. The lands described in the Complaints are necessary for the construction of the school facilities proposed by the Plaintiff and the sues of portions of the property for a vegetative buffer, wetlands mitigation, a source of fill, and for septic tank repair areas that are required and necessary for the construction of the

school facilities proposed, are clearly implied in the condemnation authority of the Dare County Board of Education; and

3. Title to the properties described in the Complaints is vested in the Dare County Board of Education, and the Board of Education is entitled to possession and ownership thereof. The description of the land affected, and the property acquired by the Dare County Board of Education, is described as follows:

PARCEL 1

BEGINNING at an iron pipe located and being in the East boundary of the lands of the Dare County Board of Education, formerly the F.F. Dailey tract, as more particularly described in a certain Deed recorded in Book 282, Page 223, Dare County registry; the said beginning point being located on the following courses and distances from North Carolina Grid Station "School", having coordinates of N 568,950.40, E 3028 552.94; North 58 deg. 39 min. 54 sec. West 79.14 feet, thence North 11 deg. 42 min. 07 sec. West 549.28 feet to the point of beginning; thence from the point of beginning North 78 deg. 17 min. 53 sec. East 75.00 feet to an iron pipe; thence cornering North 11 deg. 42 min. 07 sec. West 20 feet, more or less, to the mean high water mark of Pamlico Sound in a general Westerly direction to a concrete monument located and being at the intersection of the East boundary of the lands of the Dare County Board of Education with the shoreline of Pamlico Sound, the said point being located on a course of North 11 deg. 42 min. 07 sec. West 315.48 feet from the point of beginning; thence cornering South 11 deg. 42 min. 07 sec East 315.48 feet to the point and place of beginning.

PARCEL 2

BEGINNING at an iron pipe located and being on the following courses and distances from North Carolina Grid Station "School", having coordinates of N568,950.40, E 3028 552.94; North 58 deg. 39 min. 54 sec. West 79.14 feet to a concrete monument; thence North 11 deg. 42 min. 07 sec. West 549.28 feet; thence North 78 deg. 17 min. 53 sec. East 225 feet to the point of beginning; thence from the point of beginning North 78 deg. 17 min. 53 sec. East 75 feet to an iron pipe or other marker; thence cornering North 11 deg. 42 min. 07 sec. West 290.82 feet to an iron pipe; thence continuing North 11 deg.42 min. 07 sec. West 40 feet, more or less, to the mean high water mark of Pamlico Sound; thence cornering and along the mean high water mark of Pamlico Sound in a general Westerly direction to a point, which said point lies on the course of North 11 deg. 42 min. 07 sec. West 322.65 feet, more or less, from the point of beginning; thence cornering South 11 deg. 42 min. 07 sec. East 322.65 feet, more or less, to the point and place of beginning.

PARCEL 3

BEGINNING at an iron pipe located and being on the following courses and distances from North Carolina Grid Station "School", having coordinates of N568,950.40, E 3028 552.94; North 58 deg. 39 min. 54 sec. West 79.14 feet to a concrete monument; thence North 11 deg. 42 min. 07 sec. West 549.28 feet; thence North 78 deg. 17 min 53 sec. East 240 feet to an iron pipe, the beginning point; thence from the beginning point North 78 deg. 17 min. 53 sec. East 236.87 feet to an iron pipe located and being in the Southeast corner of the lands of Elpis Sakaria; thence cornering South 11 deg. 42 min. 07 sec. East

49.24 feet along the West boundary of the lands of the Dare County Board of Education to a point; thence cornering and along the North boundary of the lands of the Dare County Board of Education South 78 deg. 17 min. 53 sec. West 236.87 feet to a point; thence cornering North 11 deg. 42 min. 07 sec. West 49.24 feet to the point and place of beginning. This parcel being subject to easements of access, egress and ingress to the lands of Jera Associates, Jack A. Hillman, Elpis Sakaria and Raj Alexander Trust to and from said lands and North Carolina Highway Number 12.

PARCEL 4

BEGINNING at an iron pipe located and being on the following courses and distances from North Carolina Grid Station "School", having coordinates of N 568,950.40, E. 3028 552.94: North 58 deg. 39 min. 54 sec. West 79.14 feet to a concrete monument; thence North 11 deg. 42 min. 07 sec. West 549.28 feet; thence North 78 deg. 17 min. 53 sec. East 75.00 feet to the point and place of beginning; thence from the beginning point North 78 deg. 17 min. 53 sec. East 75.00 feet to an iron pipe or other marker; thence cornering North 11 deg. 42 min. 07 sec. West 292.36 feet to an iron pipe; thence continuing North 11 deg. 42 min. 07 sec. West 25 feet, more or less, to the mean high water mark of Pamlico Sound; thence along the mean high water mark of Pamlico Sound in a general Westerly direction following the meanderings thereof to a point, which said point lies on a course of north 11 deg. 42 min. 07 sec. West 317.48 feet, more or less, from the point of beginning; thence cornering South 11 deg. 42 min. 07 sec. West 317.48 feet, more or less, to the point and place of beginning.

PARCEL 5

BEGINNING at an iron pipe located and being on the following courses and distances from North Carolina Grid Station "School", having coordinates of N568,950.40, E. 3028 552.94: North 58 deg. 39 min. 54 sec. West 79.14 feet to a concrete monument; thence North 11 deg. 42 min. 07 sec. West 549.28 feet; thence North 78 deg. 17 min. 53 sec. East 375 feet to the point and place of beginning; thence North 78 deg. 17 min. 53 sec. East 101.87 feet to an iron pipe located and being in the West boundary of the Dare County Board of Education; thence cornering North 11 deg. 42 min. 07 sec. West 648 feet, more or less, along the Dare County Board of Education West boundary through a concrete monument to the mean high water mark of Pamlico Sound; thence cornering and along the mean high water mark of Pamlico Sound following the meanderings thereof in a general Southwesterly direction to a point, which said point lies on a course of North 11 deg. 42 min. 07 sec. West 390 feet, more or less, form the beginning point; thence cornering South 11 deg. 42 min. 07 sec. East 390 feet, more or less, to the point and place of beginning.

PARCEL 6

BEGINNING at an iron pipe located and being on the following courses and distances from North Carolina Grid Station "School", having coordinates of N568,950.40, E. 3028 552.94; North 58 deg. 39 min. 54 sec. West 79.14 feet to a concrete monument; thence North 11 deg. 42 min. 07 sec. West 549.28 feet; thence North 78 deg. 17 min. 53 sec. East 300 feet to the point and place of beginning; thence from the beginning point North 78 deg. 17 min. 53 sec. East 75.00 feet to an iron pipe or other marker; thence cornering North 11 deg. 42 min. 07 sec.

West 390 feet, more or less, to the mean high water mark of Pamlico Sound; thence cornering and along the mean high water mark of Pamlico Sound following the meanderings thereof in a general Southwesterly direction to a point, which said point lies on a course of North 11 deg. 42 min. 07 sec. West 330.82 feet, more or less, from the point and place of beginning; thence cornering South 11 deg. 42 min. 07 sec. East 330.82 feet, more or less, to the point and place of beginning.

PARCEL 7

BEGINNING at an iron pipe located and being on the following courses and distances from North Carolina Grid Station "School", having coordinates of N568,950.40, E. 3028 552.94: North 58 deg. 39 min. 54 sec. West 79.14 feet to a concrete monument; thence North 11 deg. 42 min. 07 sec. West 549.28 feet; thence North 78 deg. 17 min. 53 sec. Ease 150 feet to the point and place of beginning; thence from the beginning point North 78 deg. 17 min. 53 sec. East 75.00 feet to an iron pipe; thence cornering North 11 deg. 42 min. 07 sec. West 302.65 feet to an iron pipe; thence continuing North 11 deg. 42 min. 07 sec. West 20 feet, more or less, to the mean high water mark of Pamlico Sound; thence cornering and along the mean high water mark of Pamlico Sound following the meanderings thereof in a general Westerly direction to a point, which said point lies on a course of North 11 deg. 42 min. 07 sec. West 317.36 feet, more or less, from the point and place of beginning; thence cornering South 11 deg. 42 min. 07 sec. East 317.36 feet, more or less, to the point and place of beginning.

PARCEL 8

All that certain easement appurtenant to parcels above-described and bounded as follows:

BEGINNING at a concrete monument located and being on the North margin of the right-of-way of a North Carolina Highway Number 12, said highway having a right-of-way width of 60 feet at the point of beginning at the intersection thereof with the East boundary of the lands of the Dare County Board of Education, formerly the F.F. Dailey tract, as described in a Deed recorded in Deed Book 282, Page 223, Dare County Registry; the said beginning point being also located on a course of North 58 deg. 39 min. 54 sec. West 79.14 feet from North Carolina Grid Station "School", having coordinates of N 568, 950.40, E 3028, 552.94; thence from the beginning point and along the East boundary of the lands of the Dare County Board of Education North 11 deg. 42 min. 07 sec. West 549.28 feet to an iron pipe or other marker located and being in the Southwest corner of the lands of Jera Associates; thence cornering and along the South Boundary of the lands owned by Jera Associates, Elpis Sakaria, Raj Alexander Trust and Jack A. Hillman North 78 deg. 17 min. 53 sec. East 476.87 feet to an iron pipe located in the Southeast corner of lands of Elpis Sakaria; thence cornering and along the West boundary of lands of the Dare County Board of Education South 11 deg. 42 min. 07 sec. East 49.24 feet to an iron pipe; thence cornering South 78 deg. 17 min. 53 sec. West 426.87 feet to a concrete monument located and being in the West boundary of the lands of the Dare County Board of Education known as the Cape Hatteras School Property; thence South 11 deg. 42 min. 07 sec. East 504.16 feet along the West boundary of the lands of the

Dare County Board of Education to an iron pipe located and being in the North margin of the right-of-way of North Carolina Highway Number 12; thence cornering and along the North margin of the right-of-way of North Carolina Highway Number 12 South 83 deg. 00 min. 53 sec. West 50.17 feet to the point and place of beginning.

Further; and

4. The Clerk of Superior Court of Dare County shall disperse the deposit made in each of the actions by the Plaintiff pursuant to G.S. 40A-41 to each of the Defendants as a credit upon the amount of compensation to be determined and provided by law; and

5. This matter is retained on the docket for trial as to the issue of just compensation.

6. Each of the parties shall pay their own costs in this action.

This Judgment is entered out of Court and out of term pursuant to G.S. 40A-47 and agreement of the parties in the hearing of this matter, and corrected pursuant to Rule 60 (a) of the Rules of Civil Procedure.

This 25th day of May, 1994.

/Jerry R. Tillett
Superior Court Judge

APPENDIX D

SUPREME COURT OF NORTH CAROLINA

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate,
Plaintiff,
v.
ELPIS SAKARIA
Defendant.

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate,
Plaintiff,
v.
RAJ ALEXANDER TRUST, Elpis J.G.B. Sakaria, Trustee
Defendant.

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate,
Plaintiff,
v.
JERA ASSOCIATES, a Maryland Partnership
Defendant.

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate,
Plaintiff,
v.
JACK HILLMAN and wife, LILLIAN HILLMAN

ORDER

Upon consideration of the petition filed by Defendants in this matter for rehearing of the decision of this Court pursuant to Rule 31, N.C. Rules of Appellate Procedure, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 3rd day of April 1996.

S/Orr, J.
For the Court"

No. 229A95 FIRST DISTRICT

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of April 1996.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

Marvea J. Francis
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Mr. Norman W. Shearin, Jr., Attorney at Law, For Sakaria et al
Mr. Robert L. O'Donnell, Attorney at Law, For Dare County
Mr. Christopher R. Hedrick, Attorney at Law, For Dare County
Mr. Ronald E. DeVeau, Attorney at Law, For Dare County
Mr. W. Brian Howell, Attorney at Law, For Dare County
Mr. Ralph A. White, Appellate Court Reporter
West Publishing Company
Mead Data Corporation
Shephard's McGraw-Hill

No:COA94-739

FIRST DISTRICT

North Carolina Court of Appeals

DARE COUNTY BOARD OF EDUCATION,
a body politic and corporate,

Plaintiff

v.

ELPIS SAKARIA, RAJ ALEXANDER TRUST, Elpis J.G.B. Sakaria, Trustee, JERA ASSOCIATES, a Maryland Partnership, JACK HILLMAN and wife, LILLIAN HILLMAN,

Defendants

ORDER

Petition for Rehearing to review the decision of the North Carolina Court of Appeals filed on the 2nd day of May 1995 was denied by order of the North Carolina Supreme Court on the 3rd day of April 1996, and same has been certified to the North Carolina Court of Appeals;

IT IS THEREFORE CERTIFIED to the Clerk of Superior Court Dare County North Carolina that the North Carolina Supreme Court has denied the Petition for Rehearing filed by the Defendants in this cause.

WITNESS my hand and official seal this the 11th day of April 1996.

/s/
John H. Connell
Clerk, North Carolina Court of Appeals

/s/
Deputy Clerk,
North Carolina Court of Appeals

Orig. to CSC
Copy to:
Mr. Norman W. Shearin, Jr., For Sakaria, et al
Robert L. O'Donnell
R. Gregory McNeer, Jr.
Mr. Thomas L. White Jr., Attorney at Law, For Dare Cty Board of Ed
Ronald E. Deveau

APPENDIX E

United States Constitution, article I:

SECTION 8. The Congress shall have power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the Supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling for the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—

And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

* * * * * * * *

SECTION 10. No State shall enter into any treaty, Alliance or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the

net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

United States Constitution, Amendment X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX F

33 United States Code § 1344(a):

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

* * * * * * * *

(d) "Secretary" defined

The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

North Carolina General Statutes, Section 115C-517 (1995):

§ 115C-517 Acquisition of sites.

Local boards of education may acquire suitable sites for schoolhouses or other school facilities either within or without the local school administrative unit; but no school may be operated by a local school administrative unit outside its own boundaries, although other school facilities such as

repair shops, may be operated outside the boundaries of the local school administrative unit. Whenever any such board is unable to acquire or enlarge a suitable site or right-of-way for a school, school building, school bus garage or for a parking area or access road suitable for school buses or for other school facilities by gift or purchase, condemnation proceedings to acquire same may be instituted by such board under the provisions of Chapter 40A of the General Statutes, and the determination of the local board of education of the land necessary for such purposes shall be conclusive.

APPENDIX G

DARE COUNTY BOARD OF EDUCATION, a body of politic and corporate,
Plaintiff,
v.
Elpis SAKARIA, Defendant.
DARE COUNTY BOARD OF EDUCATION, a body of politic and corporate, Plaintiff,
v.
RAJ ALEXANDER TRUST, Elpis J.G.B. Sakaria, Trustee, Defendant.
DARE COUNTY BOARD OF EDUCATION, a body of politic and corporate, Plaintiff,
v.
JERA ASSOCIATES, a Maryland Partnership, Defendant.
DARE COUNTY BOARD OF EDUCATION, a body of politic and corporate, Plaintiff,
v.
Jack HILLMAN and his wife, Lillian Hillman, Defendants.

No. 229A95.

Supreme Court of North Carolina.

July 27, 1995.

Norman W. Shearin, Jr., Kitty Hawk, for Sakaria, et al.

Robert L. O'Donnell, Norfolk, VA, Christopher R. Hedrick, Newport News, VA, Ronald E. DeVeau, Manteo, for Dare County.

Prior report: 118 N.C.App. 609, 456 S.E.2d 842.

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by Defendants in this matter pursuant to G.S. 7A-30 (substantial constitutional question), the following order was entered and is hereby certified to the North Carolina Court of Appeals: the notice of appeal is

"Retained by order of the Court in conference, this the 27th day of July 1995."

Therefore the case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 14(d)(1).

Defendants shall forthwith submit an appeal bond to this Court, as provided by Appellate Rule 17(b). The bond may be in cash or by a written undertaking with good and sufficient surety in the sum of $250.00.

Upon consideration of the petition filed by Defendants in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 27th day of July 1995."

APPENDIX H

DARE COUNTY BD. OF EDUCATION
v.
SAKARIA

No. 229A95.

Supreme Court of North Carolina.

Feb. 8, 1996.

Case below: 118 N.C. App. 609, 456 S.E.2d 842.

Motion by plaintiff to dismiss appeal for lack of substantial constitutional question denied 8 February 1996.

MOTION FILED
OCT 1 1996

(2)

No. 96-185

In The
Supreme Court of the United States
October Term, 1996

ELPIS SAKARIA *and* JACK AND LILLIAN HILLMAN,
Petitioners,

vs.

DARE COUNTY BOARD OF EDUCATION,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of North Carolina

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE** OF AMERICAN HOMEOWNERS FOUNDATION, AMERICAN LAND RIGHTS ASSOCIATION, CITIZENS AGAINST REPRESSIVE ZONING,

Nancie G. Marzulla**
Lisa M. Jaeger
DEFENDERS OF
PROPERTY RIGHTS
6235 33rd St., NW
Washington, DC
20015-2405
(202) 686-4197

October 1, 1996 **Counsel of Record

Amici listing continued on next page.

29 pp

[CONTINUED FROM COVER]

BRIEF *AMICI CURIAE* OF
CITIZENS FOR CONSTITUTIONAL PROPERTY RIGHTS, INC.,
DAVIS MOUNTAINS TRANS-PECOS HERITAGE ASSOCIATION,
ENVIRONMENTAL CONSERVATION ORGANIZATION,
FRONTIERS OF FREEDOM,
HILL COUNTRY HERITAGE ASSOCIATION,
LAND RIGHTS FOUNDATION,
THE NATIONAL CENTER FOR PUBLIC POLICY RESEARCH,
THE HONORABLE RICHARD W. POMBO — MEMBER OF CONGRESS,
TRANS TEXAS HERITAGE ASSOCIATION,
and DEFENDERS OF PROPERTY RIGHTS
IN SUPPORT OF PETITIONERS

No. 96-185

In The
Supreme Court of the United States
October Term, 1996

ELPIS SAKARIA *and* JACK AND LILLIAN HILLMAN,
Petitioners,

vs.

DARE COUNTY BOARD OF EDUCATION,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of North Carolina

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF AMERICAN HOMEOWNERS FOUNDATION, AMERICAN LAND RIGHTS ASSOCIATION, CITIZENS AGAINST REPRESSIVE ZONING, CITIZENS FOR CONSTITUTIONAL PROPERTY RIGHTS, INC., DAVIS MOUNTAINS TRANS-PECOS HERITAGE ASSOCIATION, ENVIRONMENTAL CONSERVATION ORGANIZATION, FRONTIERS OF FREEDOM, HILL COUNTRY HERITAGE ASSOCIATION, LAND RIGHTS FOUNDATION, THE NATIONAL CENTER FOR PUBLIC POLICY RESEARCH, TRANS TEXAS HERITAGE ASSOCIATION, and DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONERS

Defenders of Property Rights (Defenders), moves this Court pursuant to Rule 21.2(b) of the Rules of this Court for leave to file the attached brief *amici curiae* to present arguments stating why the Petition for Writ of Certiorari should be granted. This case raises significant issues regarding the power of the federal government to coerce a state agency to use its power of eminent domain to carry out a federal objective. Specifically, the Army Corps of Engineers has orchestrated the condemnation of private property for wetland creation by a county school board, whose narrow eminent domain authority allows it to obtain property to construct school facilities.

Defenders' mission is to vigorously protect constitutionally protected property rights. Attorneys of Defenders have been counsel of record or *amicus curiae* in numerous significant property rights cases nationwide involving government decisions affecting private property rights, including *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); and *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407 (1995).

Defenders also devotes a significant portion of its resources to the litigation of regulatory taking issues across the country on behalf of property owners whose rights have been infringed in violation of the Fifth Amendment. Thus, Defenders is in a unique position to illustrate the gravity of the North Carolina Supreme Court's decision upon residential property owners nationwide. More importantly, the information presented in the attached brief will assist this Court in resolving the critical constitutional issues at stake in this case.

Counsel for Respondent has refused to consent to the filing of the attached brief *amici curiae*, thereby necessitating the filing of this motion.

For the foregoing reasons, Defenders respectfully requests that this Court grant this Motion.

Nancie G. Marzulla
Counsel of Record
DEFENDERS OF PROPERTY RIGHTS
6235 33rd Street, NW
Washington, DC 20015
(202) 686-4197

Dated: October 1, 1996

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Army Corps of Engineers' coercion of a county school board -- through its ability to impose sanctions (civil and criminal) under the Clean Water Act -- to carry out a federal objective at the local level violates the Tenth Amendment?

2. Whether a state law conferring the power of eminent domain must be strictly construed to preclude manipulation and expansion by the federal government of that power and thereby avoid abrogation of private property rights?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....iii

IDENTITIES AND INTERESTS OF *AMICI CURIAE*.....1

STATEMENT OF THE CASE.....3

STATEMENT OF FACTS.....9

REASONS WHY THE PETITION SHOULD GRANTED.....11

I. THIS CASE RAISES AN IMPORTANT CONSTITUTIONAL ISSUE WHICH SHOULD BE RESOLVED BY THIS COURT -- NAMELY, WHETHER COERCION BY THE U.S. ARMY CORPS OF ENGINEERS -- THROUGH ITS ABILITY TO IMPOSE CIVIL AND CRIMINAL PENALTIES UNDER THE CLEAN WATER ACT -- OF A COUNTY SCHOOL BOARD, TO CARRY OUT A FEDERAL OBJECTIVE AT THE LOCAL LEVEL VIOLATES THE TENTH AMENDMENT.....11

II. A STATE UNCONSTITUTIONALLY EXPANDS ITS POWER OF EMINENT DOMAIN, WHICH MUST BE STRICTLY CONSTRUED TO AVOID ABROGATION OF PRIVATE PROPERTY RIGHTS, WHEN THE POWER IS USED TO ACCOMPLISH A FEDERAL REGULATORY PURPOSE UNRELATED TO THE PURPOSE OF THE STATE GOVERNMENT AGENCY.....16

CONCLUSION.....20

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

U.S. CONST. amend. V.....17

U.S. CONST. amend. X.....11

STATUTES

33 U.S.C. § 1319 (1988).....14

N.C. GEN. STAT. § 115C-517 (1995).....5

CASES

ACORN v. Edwards, 81 F.3d 1387 (5th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3110 (U.S. July 22, 1996) (No. 96-174).....12,15

Coleman v. Thompson, 501 U.S. 722 (1991).....17

Hodel v. Virginia Surface Mining and Reclamation Assn., Inc., 452 U.S. 264 (1981).....11

Koog v. United States, 79 F.3d 452 (5th Cir. 1996), *petition for cert. filed sub nom. Gonzalez v. United States*, 65 U.S.L.W. 3001 (U.S. June 25, 1996) (No. 95-2077).....13

Lynch v. Household Fin. Corp., 405 U.S. 538 (1972).....18

McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819).....17

TABLE OF CONTENTS - cont.

New York v. United States, 505 U.S. 144 (1992) ..... *passim*

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 18

State Highway Comm'n v. M.H. Matthis, 163 S.E.2d 35 (N.C. 1968) 5

Yuba Goldfields, Inc. v. United States, 723 F.2d 884 (Fed. Cir. 1983) 15

MISCELLANEOUS

26 Am. Jur. 2d *Eminent Domain* § 5 5

White House Office on Environmental Policy, *Protecting America's Wetlands: A Fair, Flexible, and Effective Approach* (Aug. 24, 1993) 7

Carman F. Randolph, *The Law of Eminent Domain* § 113 (1991) 19

Dixy L. Ray, *Environmental Overkill* (1993) 7

Letter from John H. Zirschky, Acting Assistant Secretary of the Army (Civil Works), and Robert Perciasepe, Assistant Administrator for Water (Environmental Protection Agency) (Mar. 29, 1994), *reprinted in* Virginia S. Albrecht & Bernard N. Goode, *Wetland Regulation in the Real World* (1994) 7,8

No. 96-185

In The
Supreme Court of the United States
October Term, 1996

ELPIS SAKARIA *and* JACK AND LILLIAN HILLMAN,
Petitioners,

vs.

DARE COUNTY BOARD OF EDUCATION,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of North Carolina

BRIEF *AMICI CURIAE* OF AMERICAN HOMEOWNERS FOUNDATION, AMERICAN LAND RIGHTS ASSOCIATION, CITIZENS AGAINST REPRESSIVE ZONING, CITIZENS FOR CONSTITUTIONAL PROPERTY RIGHTS, INC., DAVIS MOUNTAINS TRANS-PECOS HERITAGE ASSOCIATION, ENVIRONMENTAL CONSERVATION ORGANIZATION, FRONTIERS OF FREEDOM, HILL COUNTRY HERITAGE ASSOCIATION, LAND RIGHTS FOUNDATION, THE NATIONAL CENTER FOR PUBLIC POLICY RESEARCH, TRANS TEXAS HERITAGE ASSOCIATION, and DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* submit this brief in support of Petitioner.

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

American Homeowners Foundation (Arlington, VA) is an independent education and research organization serving the nation's sixty-five million homeowners and millions of future homeowners.

American Land Rights Association (Battle Ground, WA) is a non-partisan grassroots coalition of farmers, ranchers, private property owners, rights holders, loggers, miners, and outdoor recreation advocates in or near federally managed areas or who are affected by federal land use or environmental laws and regulations.

Citizens Against Repressive Zoning (Haslett, MI) was formed to protect property rights at the local level. The organization works to curb abuses of zoning practices in counties, cities, villages, towns, townships, and parishes.

Citizens for Constitutional Property Rights, Inc. (Crestview, FL) is a statewide grassroots organization whose mission is to secure private property guarantees provided in the Bill of Rights.

Davis Mountains Trans-Pecos Heritage Association (Alpine, TX) is an association of Texas citizens formed in response to the abridgment of private property rights in the Davis Mountains and Trans-Pecos areas.

Environmental Conservation Organization (Hollow Rock, TN) promotes free-market alternatives to excessive regulations and is vitally concerned with federal procedures which erode private property rights.

Frontiers of Freedom (Arlington, VA) is a grassroots membership organization founded to promote the basic ideas of the Founding Fathers as articulated in the Constitution to ensure the maximum amount of individual and economic freedom for every American.

Hill Country Heritage Association (Lampasas, TX) champions the concept and practice of the conservation of natural resources in conjunction with respect for individual property rights.

Land Rights Foundation (Gloversville, NY) is an educational organization dedicated to providing information concerning the right to own and enjoy property as guaranteed by the United States Constitution and state constitutions.

The National Center for Public Policy Research (Washington, DC) promotes innovative free market solutions to environmental problems -- solutions that minimize the sacrifice of American families.

Trans Texas Heritage Association (Alpine, TX) is a statewide organization dedicated to the protection of landowner rights. Its members collectively own over fifteen million acres of land in Texas and other states.

Defenders of Property Rights is the nation's only legal defense foundation devoted exclusively to protecting private property rights. Defenders engages in litigation across the country affecting the public interest and the private property rights of its membership to vigorously protect those rights considered essential by the framers of the Constitution.

STATEMENT OF THE CASE

The issue raised in this case -- whether the U.S. Army Corps of Engineers through its ability to impose sanctions (civil and criminal) may coerce a county school board to carry out at the local level a federal objective -- involves a classic scenario that is being replicated in other contexts all across the

country. In the instant case, the Respondent county school board (Board) needed to enlarge the athletic facility of one of its schools in order to obtain accreditation. Therefore, a proposal to enlarge the school was developed using adjacent property. However, before a building permit could be issued, the federal government (United States Army Corps of Engineers)(Army Corps) stepped in and declared that some of the land on which the school board planned to build the athletic field is "wetland." Going forward with the planned construction without a federal wetland permit would subject the Respondent to civil and criminal sanctions. Without the expansion, the school could not be accredited.

Faced with this Hobson's choice (incur the Corps' sanctions or comply with the Corps' wetland permitting requirements), the Respondent "chose" to comply with the federal government's requirements. As a result of this coercion, the Respondent became the "instrumentality" of the federal government in violation of the Tenth Amendment of the U.S. Constitution. *New York v. United State*s, 505 U.S. 144 (1992). That is, Petitioners' privately owned building lots were not condemned to further a state goal or objective; rather,

the condemnation was carried out to satisfy federal mitigation requirements set forth in Section 404 of the Clean Water Act.

In fact, the Respondent never had any intention of condemning the Petitioners' lots for its own use. Indeed, the condemnation of Petitioners' lots could not have been for a state purpose since there is nothing in the Respondent's enabling act authorizing the condemnation of private property to satisfy the requirements of the Clean Water Act.[1]

As explained by the 1968 holding cited (but not applied) by the court below, *State Highway Comm'n v. Matthis*, 163 S.E.2d 35 (N.C. 1968), the general rule is that a state's power to condemn private property is limited: "An agency of the State established by act of the General Assembly is not empowered to exercise the State's inherent right of eminent domain unless such power is expressly granted by the General Assembly." *Id.* at 37, citing 26 Am. Jur. 2d *Eminent*

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[1] Section 115C-517 of the North Carolina General Statutes sets forth a narrow set of circumstances in which condemnation of private property by the Respondent is appropriate: To acquire a "suitable site or right-of-way" for "a school, school building, school bus garage or for a parking area or access road suitable for school buses or for other school facilities. " N.C. Gen. Stat. § 115C-517 (1995). There is nothing in that delegated grant of authority that even suggests that the Respondent is empowered to condemn private property to accomplish a federal objective, in this case, achievement of the Section 404 objectives of the Clean Water Act .

Domain § 5. As the court below properly observed, the state's power of eminent domain is limited because:

> [T]he exercise of the power of eminent domain is in derogation of property rights, all laws conferring this power must be strictly construed; therefore, statutory grants of the power of eminent domain are "limited to the express terms or clear implication of the act or acts in which the grant of the power of eminent domain is contained."

Pet. App. at 7b-8b (citations omitted).[2]

Thus, the failure of the court below to construe narrowly the Respondent's authority to condemn private property has not only upset the balance of power between the state and the individual (Fifth Amendment private property rights of Petitioners), but it has also upset the balance of power between the federal government and the state (Tenth Amendment protections).

The resolution of these constitutional issues is of enormous significance because so much private land is under the jurisdiction of the federal government as "wetland." Under the current federal wetlands manual, as much as sixty percent of the total United States land area is deemed "wet."[3]

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[2] Reference to Petition for Writ of Certiorari Appendix.

[3] For example, according to some federal guidelines, forty percent of the state of California is presumably "wet" and ninety percent of the state of

Moreover, approximately 74 percent of the nation's wetlands are privately owned. White House Office on Environmental Policy, *Protecting America's Wetlands: A Fair, Flexible, and Effective Approach* (Aug. 24, 1993).

Given the sheer number of acres affected by the federal wetlands program (anywhere from 100 million to 200 million acres), it is no surprise that the wetlands enforcement program has burgeoned over the lack two decades into a permitting program requiring the processing, for example, of 28,000 permits in 1992. Letter from John H. Zirschky, Acting Assistant Secretary of the Army (Civil Works), and Robert Perciasepe, Assistant Administrator for Water (Environmental Protection Agency) (Mar. 29, 1994), *reprinted in* Virginia S. Albrecht & Bernard N. Goode, *Wetland Regulation in the Real World* (1994) at Appendix C.

A major component of the federal permitting program involves "mitigation," a process whereby new wetland is created in exchange for being granted permission (in the form of a Section 404 permit) to disturb land deemed wet. Typical mitigation requirements can range from the applicant

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Alaska may also be legally "wet." Dixy L. Ray, *Environmental Overkill* 99 (1993).

being required to create or dedicate as much wetland to be disturbed, to being required to create or dedicate ten times as much wetland to be disturbed.[4] In 1993, for every acre of wetland lost or impacted by development pursuant to Army Corps-issued permits, 1.3 acres of wetland were created. Virginia S. Albrecht & Bernard N. Goode, *id.* § 5.26.

Given the breadth and reach of the federal wetland program alone, the ramifications of allowing the decision below to go unreviewed sends the clear message to all states and school boards across the country that they are free to abrogate the Tenth Amendment and to become instrumentalities of the federal government, cavalierly destroying private property rights.

Accordingly, *amici curiae* urge this Court to grant this Petition for Writ of Certiorari to review the decision below and provide guidance to lower courts on the important constitutional issues regarding the state's power to condemn private property for a federal purpose and whether that power must be strictly construed to protect private property rights.

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[4] In the instant case, the federal government demanded that 1.84 acres be dedicated as wetland in order to obtain the federal Section 404 permit.

STATEMENT OF FACTS

Prior to the Respondent's condemnation of Petitioners' property, Petitioners Elpis Sakaria, a widow, and Jack and Lillian Hillman each owned beautiful beach-front property with trees and wild flowers on which they intended to build retirement homes. Both building lots are zoned residential and have provisional approval for septic system installation.

At the same time Petitioners were planning to build their retirement homes, Respondent Dare County Board of Education (Board) began to undertake expansion of the athletic facilities for the Cape Hatteras School in Buxton, North Carolina. The expansion was necessary to obtain accreditation from the Southern Association of Secondary Schools and Colleges. Pet. App. 2b.

Originally the Board intended to use a 12.5 acre tract of land that it owns for the necessary expansion. However, 3.1 acres of that 12.5 acre tract[5] of land were designated "wetland" by the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act, and under jurisdiction of the North

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[5] There is an ambiguity in the number of acres of Respondent's parcel that is considered wetland by the U.S. Army Corps of Engineers. For the purpose of this argument, *amici curiae* adopt the figures cited by the North Carolina Court of Appeals and in the Petition for Writ of Certiorari.

Carolina Department of Environment, Health, and Natural Resources, Division of Coastal Management (Coastal Management). Although the Respondent never wanted to condemn Petitioners' property, the Respondent was conscripted into selecting and condemning the property in order to obtain the federal Section 404 permit.

Indeed, the U.S. Army Corps of Engineers had denied the Respondent's first two applications (in 1988 and 1992) for the dredge and fill Section 404 permit needed to build athletic fields on the 9.4 acres. The reason for the denials was that the activity would result in an "unacceptable loss of wetlands." Pet. App. 3b.

The Respondent considered approximately forty-one off-site parcels, but each was rejected because the Army Corps had given lower "preference" to off-site mitigation than to adjacent mitigation. Pet. App. 6b. Thereafter, the Respondent's selection process was primarily driven by the goal of adhering to the Army Corps' "sequence of preference." *Id.* Based upon the Corps' "sequence of preference" the Respondent submitted a third application to the Corps -- which

included condemning Petitioners' building lots -- which was accepted.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. This Case Raises An Important Constitutional Issue Which Should Be Resolved By This Court -- Namely, Whether Coercion By The U.S. Army Corps Of Engineers -- Through Its Ability To Impose Civil And Criminal Penalties Under The Clean Water Act -- Of A County School Board, To Carry Out A Federal Objective At The Local Level, Violates The Tenth Amendment.

The Tenth Amendment assures us of a federal government of limited power.[6] In *New York v. United States*, 505 U.S. 144 (1992), this Court held that the Tenth Amendment limits the power of Congress to regulate state actions: "Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 161. *See also Hodel v. Virginia Surface Mining and Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981).

At issue in *New York v. United States* was a federal law that required states to take title to and possession of low-

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[6] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

level radioactive waste generated within the state's borders. In holding that the legislative scheme, which coerced state action, violated the Tenth Amendment, this Court explained: "We have always understood that even whether Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *New York*, at 166. Critical to this Court's analysis was the fact that the state had no meaningful choice but to succumb to the federal government's coercive scheme: "No matter which path the State chooses, it must follow the direction of Congress." *Id.* at 177.

More recently, the United States Court of Appeals for the Fifth Circuit applied this Court's holding in *New York v. United States* in two similar contexts. In *ACORN v. Edwards*, 81 F.3d 1387 (5th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3110 (U.S. July 22, 1996) (No. 96-174), the court examined a provision of the Lead Contamination Control Act (LCCA) requiring states to establish programs to remove lead contaminants from schools and day care centers. The Fifth Circuit held that the requirement violates the Tenth

Amendment -- despite the government's claim that states had the complete discretion to determine the means employed for achieving the Act's goals:

> [The LCCA] *requires* each State to "establish a program, consistent with this section," . . . Failure or refusal to establish the mandated program subjects the States to civil enforcement proceedings. . . . The States thus face a choice between succumbing to Congressional direction and regulating according to Congressional instruction, or being forced to do so through civil action in the federal courts. In actuality, this "is no choice at all."

Id. at 1394 (emphasis in original)(citations omitted).

Similarly, in *Koog v. United States,* 79 F.3d 452 (5th Cir. 1996), *petition for cert. filed sub nom. Gonzalez v. United States*, 65 U.S.L.W. 3001 (U.S. June 25, 1996) (No. 95-2077), the Fifth Circuit held that the duties directly imposed on local law officials under the Brady Act also violated the Tenth Amendment:

> The Brady Act requires the CLEOs [local law officials] to make the essential policy choices raised by the Act, namely, to decide exactly how intrusive a background search to conduct. . . . The CLEOs, not Congress, are to gauge the intrusiveness and cost, paid with local tax dollars, of an extensive background check. And the CLEOs, not Congress, are to weigh these negatives against the extent of community support for background checks

> and any benefits that background checks may bring, such as increased safety to the community. In the most fundamental sense, the CLEOs are crafting a local solution to what the Brady Act recognized as a national problem.

Id. at 457.

The rationale employed in *New York v. United States,* and amplified in these two recent Fifth Circuit decisions, is directly applicable to the case at bar. True, in the instant case it is a federal agency and a regulatory scheme instead of Congress and legislation that compelled the state action. But those distinctions do not distinguish this case from *New York.* Here the Respondent never intended nor even needed to condemn Petitioners' property in order to enlarge the athletic field. Rather, the U.S. Army Corps of Engineers and its enforcement of its regulatory scheme under the Clean Water Act compelled the condemnation.[7] Far from having a choice of whether to carry out the condemnation, the Respondent would have been subject to substantial sanctions had it undertaken the proposed development without the Section 404 permit. 33 U.S.C. § 1319 (1988).

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[7] One might argue that the Board could simply have declined to purchase the property, however, it is not a "meaningful alternative" to require the Board to forego accreditation. *New York v. United States*, 505 U.S. 144 (1992)

In short, there is no "carrot" but only a "stick" for the Respondent in the U.S. Army Corps wetland regulatory scheme. Thus, just as the Fifth Circuit concluded with respect to the LCCA in *ACORN v. Edwards*, this coerced condemnation of Petitioners' property clearly violates the Tenth Amendment.

Even if the mitigation site selection process was a "negotiated" decision, as an environmental consultant described it at trial, Pet. App. at 6b, the legal analysis does not change. The United States Court of Appeals for the Federal Circuit has described the unequal power of the Army Corps in similar circumstances:

> The trial court's characterization of the role of the United States as that of a private person is flawed by its disregard of the express notice, "dredging is prohibited." Private persons do not talk like that; governments do. . . . But the United States is not a private party. It imposes penalties, criminal and civil, the threat of which lurks behind government statements like those here involved, regardless of what the government may have intended. The United States calls upon unlimited resources.

Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 889 (Fed. Cir. 1983).

The unequal bargaining power of the federal government translated in this case into the condemnation of Petitioners' property. In condemning the Petitioners' property the Respondent Dare County School Board functioned as a local arm of the U.S. Army Corps of Engineers, itself an indication of a Tenth Amendment violation:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart.

New York v. United States, 505 U.S. 144, 188 (1992).

Therefore, on the basis that the condemnation of Petitioners' property was coerced in violation of the Tenth Amendment, *amici curiae* urge this Court to grant the requested Petition for Certiorari.

II. A State Unconstitutionally Expands Its Power Of Eminent Domain, Which Must Be Strictly Construed To Avoid Abrogation Of Private Property Rights, When The Power Is Used To Accomplish A Federal Regulatory Purpose Unrelated To The Purpose Of The State Government Agency.

As this Court explained in *New York v. United States*, the fundamental purpose of the Tenth Amendment is not to

protect the State (or the Respondent in this case), but to protect the individual citizen -- the Petitioners: "[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992), *citing Coleman v. Thompson*, 501 U.S. 722, 759 (1991). Had the court below enforced the Tenth Amendment in the instant case, Petitioners would not have lost their property under an unconstitutional regime.

The significance of this error is underscored by the fact that private property ownership (and the rights associated therewith) is the barrier between the individual and the naked power of the state.[8] Property rights is the guarantor of all of the freedoms we enjoy in this country:

> The dichotomy between personal liberties and property rights is a false one. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right. . . . In fact, a fundamental interdependence exists between the personal

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[8] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, *nor shall private property be taken for public use, without just compensation.*" U.S. Const. amend. V (emphasis added).

> right to liberty and the personal right in property. Neither would have meaning without the other.

Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

As this Court also warned in 1922, despite the clear benefit to all society in terms of individual freedom and liberty, the natural tendency of government is to erode private property rights: "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend that qualification more and more until at last private property rights disappear."[9] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

The court below upheld this "natural tendency" to allow erosion of private property rights by broadly construing the state's authority to condemn private property. Indeed, the court below itself noted that the power of eminent domain "is in derogation of private property rights" and therefore stated that "all laws conferring this power must be strictly construed." Pet. App. at 8b. Nevertheless, the court below failed to apply its own standard and astonishingly held that the

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[9] Indeed, just as surely as the "power to tax is the power to destroy," so is the power to condemn private property. Thus, the power of eminent domain must in all circumstances be narrowly construed. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819).

Respondent School Board has the "discretionary" authority to condemn for whatever reasons it thinks best. *Id.* Such a holding flies in the face of the very notion of strict construction.

Moreover, the Respondent, in its endeavor to satisfy the dictates of the U.S. Army Corps of Engineers, did not even consider the constitutionally protected property rights of the Petitioners. The decision below indicates that the sites for mitigation were selected "for various reasons, including distance, expense . . . We were trying to meet all the regulatory requirements. . ." Pet. App. at 6b. Nowhere in this analysis do considerations of "economic impact on the private property owner" or "destruction of the investment-backed expectations" even appear in the selection equation.[10]

Compounding the federal government's abuse of its power to coerce the Respondent to condemn Petitioners' property for its own purpose in the first instance, is the fact

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[10] This is not to suggest, however, that the construction be so narrow as to preclude a reasonable interpretation of condemnation authority to allow the state to accomplish a purpose necessarily incidental to the main use. *See generally* Carman F. Randolph, *The Law of Eminent Domain* § 113 (1991). However, a strict construction of Respondent's power of eminent domain would not preclude such a reasonable conclusion, but it would preclude the clearly unlawful exercise of eminent domain in the present case to accomplish the goals of the Clean Water Act.

that the value proposed for Petitioners' property was significantly reduced because it is deemed "wetland" by the U.S. Army Corps of Engineers. Thus, the Respondent was able to condemn Petitioners' building lots once valued at $139,000 per lot for a fraction of their original market value -- to satisfy the U.S. Army Corps mitigation requirements. In short, the abuse of governmental power has gone full circle.

CONCLUSION

For the foregoing reasons *amici curiae* respectfully urge this Court to grant the Petition for Writ of Certiorari and resolve these important constitutional issues.

Respectfully submitted,

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October 1, 1996

Supreme Court, U.S.
F I L E D
OCT 2 1996
CLERK

No. 96-185

In The

Supreme Court of the United States

October Term, 1995

ELPIS SAKARIA and JACK AND LILLIAN HILLMAN,

Petitioners,

vs.

DARE COUNTY BOARD OF EDUCATION,

Respondent.

On Petition for Writ of Certiorari to the North Carolina Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent submits that the question presented that accurately characterizes the proceedings below is as follows:

Whether, consistent with the division of powers established by Article I and the Tenth Amendment to the United States Constitution, a state court may interpret the meaning and scope of that state's own condemnation statute, when the condemnor seeks to condemn land that it will use for wetlands mitigation and fill.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	iii
Statement of Jurisdiction	1
Constitutional Provisions and Statutes Involved	1
Statement of the Case	1
A. Course of Proceedings and Disposition of the Case Below.	1
B. Correction of Misstatement of Facts and Law in Petition.	5
Reasons for Denying the Writ	6
I. This Court Has No Jurisdiction To Consider Petitioners' Arguments.	6
A. The Question Presented Was Not Decided Below.	6
B. This Case Is Moot.	7
C. The North Carolina Courts Did Not Interpret Federal Law In Rendering Their Decisions.	7

Contents

	Page
II. The Clean Water Act Was Not An Issue In State Court.	8
III. A Decision By This Court Creating A Uniformity Of State Condemnation Law As Pertains To Wetland Mitigation Will Usurp The Political And Judicial Power Of The States And Confuse Political Accountability Rather Than Delineate It.	9
Conclusion	11

TABLE OF CITATIONS

Cases Cited:

Michigan v. Long, 463 U.S. 1032 (1983)	9
Oregon v. Hass, 420 U.S. 714 (1975)	8, 9
State of Missouri v. Keevan, 1994 Mo. App. Lexis 871	9
Yee v. City of Escondido, 503 U.S. 519 (1992)	7

Statutes Cited:

28 U.S.C. § 1257	7
28 U.S.C. § 1257(a)	1, 7

Contents

	Page
Miss. Code Ann. § 65-1-51	9
N.C. Gen. Stat. § 115C-517	1, 10
R.R.S. Nebraska § 39-1320(2)(0)	9
United States Constitution Cited:	
Article I	i
Article III, Section 2	1, 7
Tenth Amendment	i, 1, 10
APPENDIX	
Appendix A — Relevant Statute and Constitutional Provisions	1a
Appendix B — Site Development Plan	3a

Respondent requests that the Court deny the petition for writ of certiorari seeking review of the judgment of the North Carolina Supreme Court entered on February 9, 1996.

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). The question presented for review in the petition was never presented to the North Carolina courts. *See* below.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

N.C. Gen. Stat. § 115C-517 is printed in Pet. App. F.

28 U.S.C. § 1257(a) is set out at Resp. App. A.

Article III, Section 2 of the United States Constitution is set out at Resp. App. A.

United States Constitution, Amendment X is set out at Resp. App. A.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below.

Respondent Dare County Board of Education (board), is a local school board in Dare County, North Carolina. Pet. App. 3c. It operates the Cape Hatteras School (the school), a public school in Buxton, Dare County, North Carolina, that serves children from kindergarten through 12th grade. *Id.* The

school is located on the soundside of the Outer Banks, a long narrow strip of land separating the Pamlico Sound from the Atlantic Ocean. The school campus comprises 18 acres, 17 acres less than the site standards set by the State of North Carolina (the state) and the Southern Association of Secondary Schools and Colleges (the association). Pet. App. 3c-4c. The school obtained accreditation from the state under a waiver. The school board is a local public condemnor under North Carolina law. *Id.*

In 1985 the school board began to investigate the feasibility of constructing recreational fields on a 12.5 acre lot, owned by the board, just west and adjacent to the academic campus. Pet. App. 2b-3b. Approximately 3.1 acres of the 12.5 acre lot was comprised of wetlands, and thereby within the jurisdiction of the United States Army Corps of Engineers (Corps) and the North Carolina Department of Environment, Health and Natural Resources, Division of Coastal Management (Coastal Management), and subject to numerous state and federal regulations. Pet. App. 3b. The board sought to bulkhead and fill the wetlands on its 12.5 acre tract for ballfields, and hence needed a dredge and fill permit from the Corps.

As part of the permit application process the board had to first obtain a "consistency determination" from Coastal Management. Coastal Management rejected the board's first application "because [the board's] proposal would result in an unacceptable loss of wetlands." Pet. App. 3b. A second application was also denied in 1992. *Id.*

After Coastal Management rejected the board's first application, the board formed an ad hoc committee to find alternative sites for the proposed athletic fields and/or wetland mitigation. Forty-one sites were considered. All were found to

be unsuitable both for the facility itself and as mitigation property. Pet. App. 5c. The committee returned to the original focus on its own land and petitioners' adjoining lots. Pet. App. 6c.

The petitioners owned six undeveloped and unimproved lots, rectangular in size (approximately 75' x 300' each). The lots were bound on three sides by school board property and the fourth by the Pamlico Sound. R.259, Pet. App 3g. Approximately 90% of lots 5 and 6 were comprised of jurisdictional wetlands. R. 287, *see* Pet. App. 7c. Access to the lots was by a deeded right of way over school board property. R. 10.

The board reduced the planned size of its facility and reconfigured the location of the fields. Pet. App. 5c. The new plan provided for a baseball field primarily on the board's adjoining tract and the right of way, and a combination football/ soccer/softball field on its present field, part of the right of way to petitioners lots and the high ground of four of petitioners' six lots. Pet. App. 6c. The remaining two lots, the subject of the petition, would have no access to a public road and be virtually valueless, even if not utilized by the project for wetland mitigation and fill. *See* Pet. App. 8c. The board planned to convert the small amount of high ground on those lots, consisting of approximately a total of one-half an acre, to wetlands to partially offset the wetlands filled for the baseball field. Respondent has included as Appendix B a site development plan, R. 287. The board's land provided the remaining 1.3 acres of high ground necessary for mitigation. Pet. App. 4b. In addition, the board planned to utilize petitioners' land for teaching and educational programs. Pet. App. 8c.

As before, the board was required to obtain a permit to fill

jurisdictional wetlands. A permit application was submitted on February 15, 1993, that included the use of petitioners' lots as stated above. The board filed condemnation complaints in the trial court on February 19, 1993. On August 6, 1993, the board received a Corps permit to construct bulkheads and fill wetlands in accordance with the permit application subject to several conditions. Pet. App. 10c.

On January 24, 1994, the trial court conducted a bench trial on whether the board had the statutory authority to condemn petitioners' land for the purposes intended. The trial court concluded that petitioners' land was necessary for the construction of school facilities and that condemnation authority for the uses proposed for petitioners' land was clearly implied in state law. Pet. App. 14c.

Petitioners appealed. The court of appeals articulated the questions for review:

> The issues presented are (I) whether N.C. Gen. Stat. Section 115C-517 permits a local board of education to condemn land solely used as wetlands mitigation and a source of fill; and (II) if so, whether plaintiff's action of condemning lots 5 and 6 as necessary to build athletic facilities was an arbitrary abuse of discretion. Pet. App. 7b.

In its decision, the unanimous court held that the board has discretion to determine what land constitutes a "suitable site" for athletic facilities and what land is "necessary" for that construction, ". . . which may, depending on the circumstances of a particular case, encompass more than the actual land on which the athletic facility sits." Pet. App. 8b. Upon further appeal the North Carolina Supreme Court affirmed per curium. Pet. App. 2a.

On April 15, 1996, the issue of just compensation for the taking of petitioners' land, including lots 5 and 6, was tried by jury. Final judgment on the verdict, costs, and interest was filed in the trial court on June 7, 1996. On June 17, 1996, respondent paid the judgment amount, plus costs and interest into the office of the Dare County Clerk of Superior Court. As provided by North Carolina law, it obtained a discharge and the judgment was cancelled and released of record. On June 21, 1996, petitioners withdrew the sums paid in satisfaction of their judgment, including for lots 5 and 6. Thereafter petitioners filed their petition for writ of certiorari in this Court.

B. Correction of Misstatement of Facts and Law in Petition.

The Court is referred to the foregoing statement as providing a more balanced and accurate recitation of the procedural background and the salient facts. Judge Greene of the North Carolina court of appeals accurately summarized the relevant evidence at trial and more importantly, clearly stated the question presented for decision by the court. Pet. App. 7b. Judge Greene's entire opinion is presented as Appendix B to the petition. In addition, Judge Tillett, the trial judge who heard the evidence, entered 51 findings of fact. His judgment is reproduced as Appendix C to the petition.

The most significant misstatement in the petition is at its core — the question presented to and the decision of — the North Carolina courts. Page seven of the petition includes the following:

> The constitutional question presented here — whether a state court may rely on the assumed dictates of federal law to expand state regulatory authority without violating

the constitutional division of powers principles — was properly raised below.

This Court can search the opinions and orders of the state courts, as well as the briefs and memoranda of counsel filed therein, and will not find a hint of discussion, debate or decision of that question. Petitioners have distorted the actual issues and holdings below so to create a constitutional argument that did not previously exist.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER PETITIONERS' ARGUMENTS.

A. The Question Presented Was Not Decided Below.

Petitioners argue that the North Carolina courts have "decreed" that a school board may rely on federal regulations for authority to condemn private property. Pet. 3, 7. From that erroneous assertion, petitioners then present to this court the question of whether that non-existent decision violates the separation of powers doctrine. Pet. i. Petitioners' question presented for review was never decided, briefed, presented, noted, nor probably even thought of by any of the three North Carolina courts that considered this case or by either party heretofore.

The constitutional validity of a federal or state statute was not questioned by either party or decided by the North Carolina courts. *See* foregoing statement and opinions below. Pet. App. A, B and C. Neither was nor is it claimed that a state law conflicts with a federal statute or treaty. Finally, petitioners do not assert any title, right, privilege, or immunity under the Constitution, treaties or statutes of the United States.

The question raised by petitioners does not present a case arising under the Constitution or statutes of the United States nor does it present any other basis for the exercise of this Court's judicial power authorized in Article III, Section 2 of the United States Constitution.

This case is and was a garden variety question of the interpretation of a state statute by a state court. There was no issue of federal law raised or decided by the North Carolina courts. Petitioners' erroneous description of the holding below — that a state court may rely on a federal statute to condemn private property — should not raise a cognizable basis for jurisdiction under 28 U.S.C. § 1257(a).

This Court refuses to review judgments rendered by the highest court of a state unless a federal question has been both raised and decided in the state court below. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (in reviewing judgments of state courts under 28 U.S.C. § 1257, the Court will refuse to consider claims that were not raised or addressed below).

B. This Case Is Moot.

Petitioners have accepted and received the money the jury determined was just compensation for the property condemned by respondent. *See* foregoing statement. This controversy is now moot. There is no case over which this court can properly exercise jurisdiction.

C. The North Carolina Courts Did Not Interpret Federal Law In Rendering Their Decisions.

Petitioners argument appears to be as follows: Federal law requires a permit to fill certain wetlands. One way to obtain a

permit is to create wetlands elsewhere. Petitioners' lots 5 and 6 will be utilized by respondent initially and primarily to create wetlands so that all of both lots will then be wetlands. Respondent condemned lots 5 and 6 (as well as lots 1-4). That action was upheld by every North Carolina judge that has reviewed the case. Since federal law authorizes wetland mitigation the state courts have "assumed" that federal law "dictates" that any unexpressed general condemnation authority held by a local condemnor must include authority to condemn for wetlands mitigation. Thus, the constitutional powers doctrine has been violated by the state court decision in this case. Pet. 7, 9.

The major difficulty with this argument is that the North Carolina courts did not assume the existence of any federal dictate. The issue was not raised or probably even considered by either party or any court. The issue was purely one of state statutory interpretation based upon the facts of this particular case. *See* Pet. App. B and C.

II.

THE CLEAN WATER ACT WAS NOT AN ISSUE IN STATE COURT.

The Corps' primary responsibility in this arena is to protect ecosystems rather than to become embroiled in property title disputes. Mr. Wood, respondent's consultant, testified at trial that the ". . . Corps of Engineers doesn't require that we even show that the property is owned by the applicant. The deed nor any other kind of instrument is required by the Corps." R. 242.

The holdings of the North Carolina courts did not discuss the Clean Water Act except by way of background. No *question* of federal law was raised in the lower courts, as in *Oregon v.*

Hass, 420 U.S. 714 (1975), cited by petitioners, and it is clear from the North Carolina Court of Appeals' opinion that the decision rested on state law interpretation without reference to any federal law or policy in contrast to *Michigan v. Long*, 463 U.S. 1032 (1983), also cited by petitioners. *See* Pet. App. 1b-11b.

III.

A DECISION BY THIS COURT CREATING A UNIFORMITY OF STATE CONDEMNATION LAW AS PERTAINS TO WETLAND MITIGATION WILL USURP THE POLITICAL AND JUDICIAL POWER OF THE STATES AND CONFUSE POLITICAL ACCOUNTABILITY RATHER THAN DELINEATE IT.

Petitioners' political accountability argument is difficult to understand. If one believes that wetlands should be filled without corresponding mitigation one should approach the federal agencies involved (EPA or CORPS) or one's senator or congressman. If one believes school boards should not be authorized to condemn for wetland mitigation one should seek to amend the state statute. If one believes the state judges made an erroneous decision of the law, one should seek to vote them out of office. If one believes the school board members should not have condemned petitioners' land one should seek to replace them.

Some state statutes expressly authorize condemnation for wetland creation. *See, e.g.*, Miss. Code Ann. § 65-1-51; R.R.S. Nebraska § 39-1320(2)(0). Perhaps other state courts have held that under the circumstances of the case before it and the law of that state, authority to condemn to create wetlands was not authorized. *See, e.g., dicta* in *State of Missouri v. Keevan*, 1994 Mo. App. Lexis 871, relied on by Petitioners in state court. Indeed, that is the way federalism should work — each state

determining for itself the extent of the authority granted its local condemnors.

Apparently petitioners seek to have this court dictate to the states whether or not a local public condemnor can or cannot condemn land for wetlands mitigation, regardless of the factual circumstances of the case. How this grasp of traditionally state law concern (*cf.* United States Constitution, Amendment X) will in any way promote any federal policy concerning wetlands is not explained. The federal policy, be it no net loss of wetlands, or whatever, remains intact regardless of this Court's holding.

Petitioners argue that this Court should intervene to ensure integrity of state law. Pet. 15. How a dictate from this Court imposing an interpretation of a North Carolina condemnation statute on the North Carolina courts will ensure the integrity of North Carolina law is also not explained.

It is not clear what petitioners would have this Court hold to remedy the alleged "undermining of the basic structure of our federal system". The state statute at issue, N.C. Gen. Stat. § 115C-517, is only one of several sources of statutory condemnation authority in North Carolina law. Does petitioner seek a decision of this court that will impact all other local and state condemnors, and perhaps the North Carolina Constitution, or just boards of education? Either way integrity of North Carolina law will be shaken, rather than ensured.

What remedy do petitioners' seek? They have not tendered the money they withdrew from court as just compensation. Do they seek to have the project reversed? There is no stay order in effect. Should the state courts re-litigate whether the board can condemn lots 5 and 6 for another purpose? Petitioners do not

challenge the taking of their lots 1, 2, 3 and 4 nor of the exclusive right of way to lots 5 and 6. Actually and practically there is no existing case or controversy.

CONCLUSION

For the reasons stated, this Court should not exercise jurisdiction, and the writ of certiorari should be denied.

Dated: October, 1, 1996.

Respectfully submitted,

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APPENDIX A — RELEVANT STATUTE AND CONSTITUTIONAL PROVISIONS

28 U.S.C. § 1257(a)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statues of, or any commission held or authority exercised under, the United States.

Art. III, Section 2, United States Constitution

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have

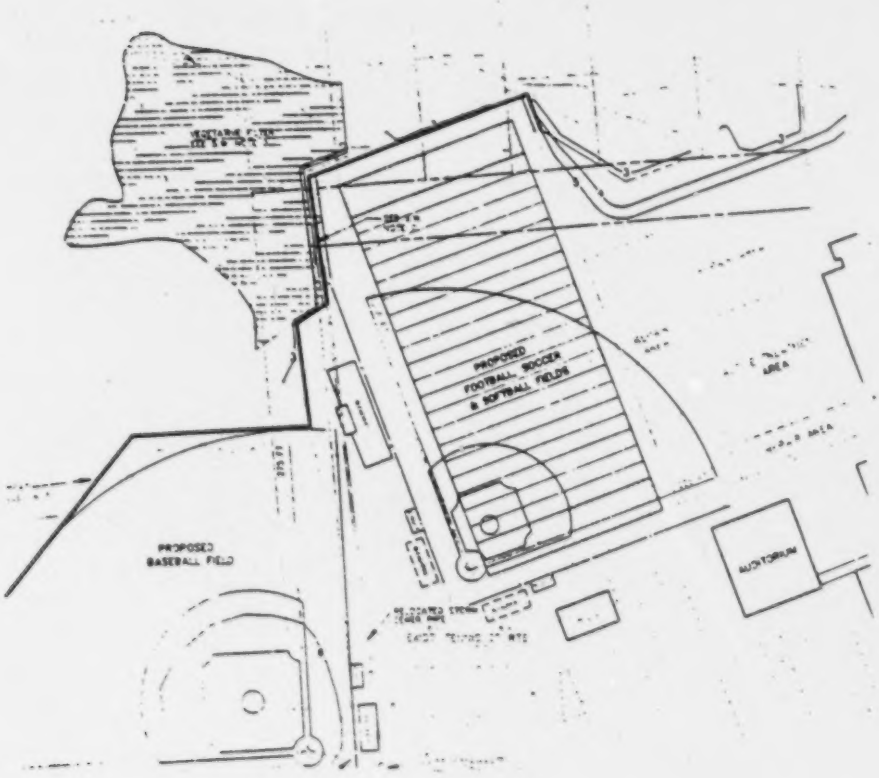
appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

United States Constitution, Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

BEST AVAIL

APPENDIX B — SITE DEVELOPMENT PLAN



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No. 96-185

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ELPIS SAKARIA *and* JACK AND LILLIAN HILLMAN
Petitioners,

v.

DARE COUNTY BOARD OF EDUCATION
Respondent.

On Petition For Writ of Certiorari To
The North Carolina Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF CLARENDON FOUNDATION AND THE FAIRNESS TO LAND OWNERS COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 37.2 of this Court, Clarendon Foundation and The Fairness to Land Owners Committee respectfully move for leave to file the attached brief as *amici curiae* in support of the Petition for Writ of Certiorari. Petitioners have consented to the filing of this brief; respondents have not, thus necessitating the filing of this motion.

Clarendon Foundation is a nonprofit, nonpartisan legal foundation concerned with significant legal issues related to the Constitution and democratic government. The Foundation participates in various forums in cases where the resolution of constitutional issues implicates basic rights, including the rights attendant to the ownership of property. The organization is committed to an ongoing review of the core tenets of our constitutional government, in the spirit of George Mason's admonition that ". . . no free government, or the blessings of liberty, can be preserved to any people, but . . . by frequent recurrence to fundamental principles." George Mason, THE VIRGINIA DECLARATION OF RIGHTS, *reprinted in* 1 THE PAPERS OF GEORGE MASON, 1725-1792, at 278 (R. Rutland ed. 1970).

The Fairness to Land Owners Committee (FLOC) is a national grassroots private property group headquartered in Cambridge, Maryland. The organization represents over 19,000 "mom and pop" members who are private property owners faced with confiscatory federal, state and local land-use laws and regulations involving wetland, endangered species, growth management, etc.

FLOC is dedicated to protecting property rights, especially the right to the prudent use of one's own land. It is active in writing and lobbying for balanced, fair and environmentally sensitive federal and state private property rights protection legislation, and is active in educating the public and lawmakers about the difference between conservation and confiscation. Its officers and members have testified numerous times before the United States Congress and state legislatures.

The issue raised by the Petition potentially affects thousands of landowners. Because of the distinct perspective that Clarendon Foundation and FLOC can offer in this case, and because our members have a substantial interest in the outcome of this litigation, our participation should assist the Court in determining that the Petition should be granted.

Respectfully submitted,

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October 1, 1996

QUESTION PRESENTED

Whether, consistent with the division of powers established by Article I and the Tenth Amendment to the United States Constitution, a state court may rely on a federal statute to expand state regulatory authority without express statutory authorization.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI* 1

SUMMARY OF ARGUMENT 2

REASONS FOR GRANTING THE WRIT. 2

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Gregory v. Ashcroft, 501 U.S. 452 (1991) . . . . . *passim*

Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264 (1981) 2,6,7

New York v. United States, 505 U.S. 144 (1992) . . *passim*

Tafflin v. Levitt, 493 U.S. 455 (1990) 3

United States v. Lopez, 115 S.Ct. 1624 (1995) . . . *passim*

STATUTES

18 U.S.C. § 922(q)(1)(A)(1988 ed., Supp. V) 5

OTHER MATERIALS

POWELL, *The Oldest Question Of Constitutional Law*, 79 VA. L. REV. 633 (1993) 6

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BRIEF OF CLARENDON FOUNDATION AND THE FAIRNESS TO LAND OWNERS COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTERESTS OF *AMICI CURIAE*

The interests of *amici* are set out fully in the preceding motion. The motion indicates that petitioners, but not respondent, have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This case presents an important and unsettled question of federal law—namely, whether a state court may undercut the critical division of state and federal authority by presuming that a federal statute can, *without express statutory authority*, expand the state's power of eminent.

We urge the Court to grant *certiorari* for a single reason, if no other. The question presented offers the Court an important occasion to further define the contours of its emerging federalism jurisprudence, as articulated in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), *New York v. United States*, 505 U.S. 144 (1992), and *United States v. Lopez*, 115 S.Ct. 1624 (1995). In particular, this Court is being asked to decide whether "a program of cooperative federalism," *Hodel v. Virginia Surface Mining and Reclamation Assoc.*, 452 U.S. 264, 289 (1981), like the Clean Water Act automatically extends state eminent domain power where the statute contains no express authorization to that effect. Given the ubiquity of such programs in federal law, the scope of authority that state courts may properly infer from them should not be left undefined.

REASONS FOR GRANTING THE WRIT

During the past few years this Court has articulated a set of doctrines that has begun to move constitutional law away from a pronounced bias in favor of centralization and toward a more careful approach to the division of authority between state and national governments. This trend is especially noticeable in a recent line of cases: *Gregory v. Ashcroft*, *New York v. United States*, and *United States v. Lopez*.

Gregory v. Ashcroft raised the question whether the Missouri Constitution, which set a retirement age of 70 for "[a]ll judges other than municipal judges," MO. CONST. art. V, § 26, violated the federal Age Discrimination in Employment Act of 1967 (ADEA). 501 U.S. 452, 455 (1991). The Court held that this state constitutional provision did not violate ADEA. *Id.* at 473. From the perspective of the instant case, the most significant aspect of *Gregory* appears in the introductory paragraphs, where the Court defined federalism, identified its benefits, and emphasized its significance as a structural protection of personal liberty. Because these paragraphs concisely express the Court's careful approach to federalism, they are worth reproducing *verbatim*:

> As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. . . . "[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." [*Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)].
>
> . . . .
>
> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

> Perhaps the principal benefit of the federalist system is a check on abuses of government power. . . . Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . If this "double security" is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. *In the tension between federal and state power lies the promise of liberty.*

Id. at 457-59 (emphasis added).

This careful approach to federalism made a noteworthy appearance in *New York v. United States*, 505 U.S. 144 (1992). At issue was the constitutionality of the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985. The Act was held unconstitutional under the Tenth Amendment, because it "compel[led] the States to enact or administer a federal regulatory program." *Id.* at 188. While Congress could directly enact legislation, the Court reasoned, the Constitution gives Congress no authority to direct state legislatures to enact it instead. *See id.* at 178.

The Court likewise underscored that Tenth Amendment acts only indirectly as a limitation on federal authority:

> The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.

Id. at 156-57. In other words, maintaining federalism in a robust condition depends more directly on the doctrine of enumerated powers than on the indirect reservation of power contained in the Tenth Amendment.

United States v. Lopez, 115 S.Ct. 1624 (1995), presented a recent opportunity for this Court to refine and apply its emerging conception of federalism. In that case the Court held that the Gun-Free School Zones Act of 1990, which made it a federal crime "to possess a firearm," 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V), in a school zone, exceeded Congress's authority under the Commerce Clause. Near the end of its opinion the Court refused to expand the line of precedent in which it had given maximum deference to Congress. Instead it insisted on preserving the "distinction between what is truly national and what is truly local." 115 S.Ct. at 1634. Thus, a majority of the Court perceived the existence of that distinction and deliberately left it open for more precise definition in future cases.

In each case—*Gregory*, *New York*, and *Lopez*—the Court has sought "to reconcile post-New Deal concepts of national power with the existence of legal limitations on that power derived from federalism." H. Jefferson Powell, *The Oldest*

Question of Constitutional Law, 79 VA. L. REV. 633, 635 (1993). And in each case the Court's search for reconciliation has led it to mark the outer boundaries that federal law may reach. The case at bar fits squarely into this doctrinal pattern.

In the case below the North Carolina Court of Appeals held, and the North Carolina Supreme Court affirmed, that the Dare County school board had the authority to condemn Petitioners' land to satisfy the wetlands mitigation the regulatory agency required as a condition for issuing a federal permit. Pet. App. 2a; Pet. App. 8b. *Neither federal nor state law, however, expressly authorizes wetlands mitigation or condemnation for wetlands mitigation.* Pet. App. 10-12. This case therefore raises a fundamental, but heretofore unanswered question: Whether, consistent with the enumerated powers set out in Article I and the indirect reservation of authority contained in the Tenth Amendment, a state court may implicitly rely on the Clean Water Act (CWA) to expand state eminent domain authority without express statutory authorization.

This issue offers the Court an opportunity to delineate its evolving conception of federalism from a fresh angle. Much of the law of federalism is defined in terms of limits on

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[1]As this Court acknowledged, the Clean Water Act has survived constitutional attack on Tenth Amendment grounds in the lower courts. *Hodel v. Virginia Surface Mining and Reclamation Assoc.*, 452 U.S. 264, 289 (1981). But our arguments and those of the Petitioners are not directed at the constitutionality of the Clean Water Act, *per se*. They are aimed instead at the constitutionality of the North Carolina state courts' application of the Act. Therefore, whatever precedential effect the Court's remarks in *Hodel* may retain, they have no bearing on the issues raised in this case.

congressional authority. This is certainly true of *Gregory*, *New York*, and *Lopez*. One of the most compelling aspects of this case is that *it presents a federalism issue from the other direction*. Here the threat to a healthy balance of authority between state and federal governments is posed by state courts rather than Congress. This Court is being asked to decide whether state courts may invoke a federal statute to expand the state's regulatory authority, when neither Congress nor the state legislature has granted express authority to do so. In the case at bar, the North Carolina state courts inferred eminent domain power for a purpose—*i.e.*, to obtain Petitioners' property in order to mitigate as required by the regulatory agency as a condition for issuance of a federal permit—that is found nowhere in state law or the federal Clean Water Act. Whether state courts can use federal law in this manner is a question with far-reaching implications.

CWA is a "program of cooperative federalism," *Hodel v. Virginia Surface Mining and Reclamation Assoc.*, 452 U.S. 264, 289 (1981). Such programs, which require the active participation of both federal and state officials, are ubiquitous in federal law. *See, e.g., id.* at 289 n.30 (identifying federal laws based on cooperative federalism that have withstood constitutional challenge). If the decision below were allowed to go unreviewed, every "program of cooperative federalism," 452 U.S. at 289, and perhaps every federal law applicable to state governments could be used by state courts as authority to expand state regulatory authority in ways that neither Congress nor the state legislature authorized.

Unless this Court grants review, state courts will remain free to misconstrue programs of cooperative federalism as occasions to expand by implication the state's regulatory

authority. This will profoundly unsettle the division of authority between federal and state governments. If states can expand their own authority in reliance on the silences of federal law, then federal law is being used in ways that exceed federal authority under the Constitution. Ensuring a robust federalism depends at times on the willingness of this Court to police the boundary dividing national and local authority. This is no less true when the threat comes from state courts rather than Congress.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Respondent.

On Petition For Writ of Certiorari To The North Carolina Supreme Court

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968) 4,6

Eddings v. Oklahoma, 455 U.S. 104 (1982) 6

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 7

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) 3

Yee v. City of Escondido, 503 U.S. 519 (1992) 6

STATUTES

28 U.S.C. § 1257(a)(1995) 2,3,4

N.C. GEN. STAT. § 115C-517 3,8

OTHER MATERIALS

R. STERN ET AL., SUPREME COURT PRACTICE (7th ed. 1993) 3

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

This case raises a serious constitutional question about the division of authority between the Federal Government and the states. May a state court expand by implication a state's eminent domain authority in order to satisfy the condition of a federal permit, when neither state nor federal law expressly authorizes the state to condemn private property for that purpose? Respondent has sought to condemn two lots of Petitioners' property to satisfy the Army Corps of Engineers' demand for wetlands mitigation. *See* Pet. App. 3b. The North Carolina state courts repeatedly upheld a judgment that the school board possesses the authority to condemn Petitioners' property, despite the absence of express authority under North

Carolina law or the Clean Water Act. *See* Pet. App. 8b. This is a matter of considerable constitutional moment. If left uncorrected, it would mean in effect that state courts have the unilateral power to determine the content of federal law, re-casting the division of state and federal authority prescribed by the Constitution.

Respondent fails to diffuse the force of Petitioners' showing. Instead, Respondent advances several procedural arguments to rationalize the Court's declining review. These arguments are erroneous.

1. *Jurisdiction.* Respondent contends on two grounds that this Court has no jurisdiction to review Petitioners' case. First, the school board argues that "[t]he question raised by petitioners does not present a case arising under the Constitution or statutes of the United States." Brief Opp. 7. Second, it attempts to show that "[t]here was no issue of federal law raised or decided by the North Carolina courts." *Id.* On both points, Respondent is confused.

A. Petitioners have asserted jurisdiction under 28 U.S.C. § 1257(a). Pet. App. 1. That statute grants jurisdiction for this Court to review state court decisions in the following circumstances:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the

> Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Distinguished commentators have observed that 28 U.S.C. § 1257 "covers the entire range of federal questions that can arise in a case in a state court." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 92 (7th ed. 1993). One category of cases over which this Court's jurisdiction is routinely exercised under section 1257(a) is those "which involve the construction and application of the federal Constitution, treaties, or laws." *Id.* at 91. The statute plainly does not restrict this Court's state-court-review jurisdiction to cases where a state court has ruled on the constitutional validity of a federal treaty or statute. Early in our national history the Court established that it has jurisdiction to review and, if necessary, correct the interpretation and application of federal law by state courts. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816) (Story, J.).

This case fits squarely within the contours of section 1257(a). It presents a federal question which arises out of the state court's determination that N.C. Gen. Stat. § 115C-517 authorizes the Dare County School Board to condemn Petitioners' property to obtain land for wetlands mitigation required by a federal wetlands permit. *See* Pet. App. 8b. The school board disagrees with this characterization. It writes, "This case is and was a garden variety question of the interpretation of a state statute by a state court." Brief Opp. 7. If by "garden variety" the school board means that this case has no federal aspect, it is simply mistaken. By seeking to

condemn property to satisfy a federal wetlands permit, the board has made the case *federal*. Congress enacted the law (Section 404 of the Clean Water Act) creating a need for the land that Respondent seeks to condemn, and this Court has a long-established institutional interest in ensuring the uniform interpretation and application of federal law by state courts. Beyond a routine interest in overseeing the construction and application of federal law by state courts, the Court has a substantial interest in preventing state courts from blurring the constitutional division of federal and state authority. In short, this case fairly presents a substantial federal question reviewable by the Court.

B. Respondent further contends that Petitioners failed to raise their federal question below, as required by 28 U.S.C. § 1257(a).

> Petitioners' question presented for review was never decided, briefed, presented, noted, nor probably even thought of by any of the three North Carolina courts that considered this case or by either party heretofore.

Brief Opp. 6. Again, Respondent is mistaken. To determine whether a federal question has been adequately raised "it is relevant and usually sufficient to ask whether petitioners satisfied the state rules governing presentation of issues." *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 334 (1968) (Harlan, J., dissenting). Petitioners timely raised their federal question before the North Carolina Supreme Court. In their notice of appeal they described the constitutional question arising from the judgment of the court

of appeals, which they urged on the state supreme court as justification for the exercise of its appellate jurisdiction.

> The said judgment directly involves a substantial question arising under the Fifth and Fourteenth Amendments to the Constitution of the United States and under Article 1, Section 19 of the Constitution of the State of North Carolina, in that the judgment deprives defendants of rights secured thereunder to the defendants by overruling defendants' assignments of error as to plaintiff's actions in condemning defendants' land for purposes not authorized by law, without observing the prerequisites required by law, and otherwise acting arbitrarily, capriciously and unfairly, thereby depriving defendants of their constitutional rights to due process. This constitutional issue was timely raised in the trial tribunal in defendants' answers and at trial (R, pp. 37-46, 58-59, 65-66). This constitutional issue was determined erroneously by the Court of Appeals.

Notice of Appeal at 2. The North Carolina Supreme Court retained the appeal, Pet. App. 2g, and *denied the school board's motion to dismiss the appeal for lack of a substantial constitutional question*. Pet. App. 1h. North Carolina's highest court therefore had three opportunities to rule that the landowners' constitutional question had been untimely or was otherwise defective under state law: when evaluating the notice of appeal, when deciding whether to grant the board's motion to dismiss, and when ultimately affirming the lower court judgment. Instead, the state supreme court treated Petitioners' constitutional question as not only timely but substantial. The record below thus reflects conformance to "state rules governing presentation of issues," *Amalgamated*

Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 334 (1968) (Harlan, J., dissenting), and ensures that Petitioners' constitutional question meets the test of having been adequately raised in state court.

It is well-established that the question presented in a petition for writ of *certiorari* need not frame the issue in precisely the same terms as the question was presented to the lower courts. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982). The focus of Petitioners' constitutional concern has consistently been the state court judgment authorizing the school board to condemn their land "for purposes not authorized by law." Notice of Appeal at 2. Whether concerns with such authorization are expressed broadly in terms of due process or more narrowly in terms of the structural limitations established by Article I and the Tenth Amendment makes no difference for this Court's jurisdiction—particularly when Petitioners have no alternative theory on which jurisdiction might be based. For this reason, Respondent's reliance on *Yee v. City of Escondido*, 503 U.S. 519, 532-33 (1992), Brief Opp. 7, is misplaced.

In sum, Respondent's jurisdictional objections are ill-founded. This case presents a substantial federal question that was properly raised in the courts below.

2. *Standing*. Respondent also attempts to cast doubt on Petitioners' standing to press their claims before this Court. "Actually and practically there is no existing case or controversy." Brief Opp. 11. On the contrary, the controversy could not be more lively.

This Court summarized the requirements of standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992):

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical' . . . ." Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." . . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 560-61 (citations omitted). Petitioners satisfy each of these elements. They have lost their property in a condemnation action. A more tangible "invasion of a legally protected interest," *id.* at 560, is difficult to imagine. This loss is plainly "concrete and particularized," *id.*, because it affects them in a deeply personal way. *Id.* at 561 n.1. It is also actual and not hypothetical: the loss has occurred. Moreover, the school board and not some third party caused the loss of property that lies at the root of the question presented in this case. Finally, a favorable decision by this Court will redress Petitioners' loss of property by denying the school board the authority to condemn their land for Federal wetlands mitigation. This will return two of the six parcels of land, and without these lots for mitigation the school board will lose its Section 404 permit and the authority under North Carolina

law to condemn any of the six lots originally belonging to the landowners. *See* Pet. App. 3b; N.C. Gen. Stat. § 115C-517. The return of Petitioners' land is thus the necessary and sufficient condition for a legal remedy in this case. In short, the existence of Petitioners' standing is beyond cavil.

The school board also argues that Petitioners' case is mooted by their receipt of compensation for their land. Brief Opp. 7, 10. This is incorrect. The landowners did not receive this compensation as a settlement of their claims against the board. They received it as a consequence of a jury trial on the issue of just compensation. Following that trial the North Carolina Superior Court ordered the board to pay the judgement amount plus costs and interest to the landowners. These proceeds have been frozen in an interest-bearing savings account pending the Court's disposition in this case. If the Court resolves the case in Petitioners' favor, they will simply return their share of the proceeds plus interest. The logistics of that matter, however, have nothing to do with whether the issue raised by this case is moot. That state of affairs would only obtain if the determination Petitioners seek could not have any practical effect on the existing controversy. That is manifestly not the case here. Accordingly, Respondent's mootness argument fails.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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